No. 89-1050

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

DADE COUNTY, a political subdivision of the State of Florida; DOLPHIN STADIUM CORPORATION, a Florida corporation, et al.,

Petitioners,

vs.

LAKE LUCERNE CIVIC ASSN., INC.; CRESTVIEW HOMEOWNERS' ASSN., INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

When state appellate courts uphold zoning which they must otherwise nullify if the zoning violates constitutional rights does a federal appeals court have jurisdiction to review and reverse state adjudications as the basis for permitting a subsequent civil rights damage claim?

LIST OF PARTIES

Petitioners are the following, who were Appellees below: Dade County, a political subdivision of the State of Florida; Dolphin Stadium Corporation, a Florida corporation; Joseph Robbie; Lawrence Morton, Emil Morton, individually and as Trustee, Alan Morton, Max Boderman, d/b/a Morton Properties.

Respondents are the following, who were Appellants below: Lake Lucerne Civic Assn., Inc.; Crestview Homeowners' Assn., Inc., Rolling Oaks Homeowners' Assn., Inc.; Mildred Harris; Barry Young; and Norine Fletcher.

The South Florida Regional Planning Counsel, Appellee below, has not yet joined in the Petition and is therefore named as a Respondent. Supreme Court Rule 19.6.

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DADE COUNTY, a political subdivision of the State of Florida; DOLPHIN STADIUM CORPORATION, a Florida corporation, et al.,

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LAKE LUCERNE CIVIC ASSN., INC.; CRESTVIEW HOMEOWNERS' ASSN., INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioners, Dade County, a political subdivision of the State of Florida, and Dolphin Stadium Corporation, a Florida corporation, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on October 4, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 878 F.2d 1360, and is reprinted in the Appendix hereto (herinafter cited as "App." followed by item number) at Item 1.

The Memorandum Decision of the United States District Court for the Southern District of Florida (Spellman, D.J.) has not been reported. It is reprinted at App. 2A.

JURISDICTION

Respondents brought suit in the Southern District of Florida on August 20, 1987 invoking federal jurisdiction under 28 U.S.C. §§1331 and 1343. On March 22, 1988 the Southern District granted summary judgment for Petitioners.

On Respondents' appeal the Eleventh Circuit, on August 3, 1989, entered a judgment and an opinion reversing, in part, the Southern District's order. On August 23, 1989 Petitioners filed Petitions for Rehearing which were denied by the Eleventh Circuit on October 4, 1989.

The Petition for Certiorari at bar invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Constitution, Art. IV, Sec. 1 (Full Faith and Credit).

2. 28 U.S.C. § 1738 (Full Faith and Credit).

The full text of the foregoing are included in the Appendix.

STATEMENT OF THE CASE

This case involves: (1) Dade County, Florida's zoning approval for the sports stadium housing the Miami Dolphins professional football team; and (2) whether matters actually or necessarily resolved adversely to Respondents in multiple state court adjudications may be relitigated in the lower federal courts as the basis for a one hundred million dollar ($100,000,000) damage claim. The history of facts and state court litigation, recounted in the opinion of the Eleventh Circuit Court of Appeals below,[1] (hereinafter "Opinion" or "Op.", App. 1) is reduced to its essence as follows.[2]

On October 26, 1985, the Board of County Commissioners of Dade County conducted an extensive seven-hour evidentiary public hearing to consider an application for zoning relief pertaining to a 430 acre tract where

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[1] *Lake Lucerne Civic Ass'n. Inc. v. Dolphin Stadium Corp.*, 878 F.2d 1360 (11th Cir. 1989).

[2] Pursuant to Supreme Court Rule 19.1 Petitioners have not yet requested certification of the record before the circuit court. Nevertheless, statements herein are supported by references to the record utilizing "R" followed by designations originating with the district court clerk.

the stadium was proposed to be built. After hearing extensive testimony from both those supporting and opposing the application, the Commission approved, *inter alia*,[3] the above-described zoning. Both before and after the zoning approval, Respondents initiated and prosecuted two challenges all the way to the Florida Supreme Court, which denied review. The pre-approval suit culminated in *Rolling Oaks Homeowner's Ass'n, Inc. v. Dade County*, 492 So.2d 686 (Fla. 3d DCA 1986), *rev. den.*, 503 So.2d 328 (Fla. 1987). The post-approval state litigation (hereinafter "zoning appeal") was taken first to the circuit court appellate division, then to the Third District Court of Appeal, and finally to the Florida Supreme Court. *Norwood-Norland Homeowners' Ass'n, Inc. v. Dade County*, 511 So.2d 1009 (Fla. 3d DCA 1987), *rev. den.*, 520 So.2d 585 (Fla. 1988).[4]

A three-judge circuit court appellate panel affirmed the zoning approval, after which Respondents, homeowners' associations and property owners, petitioned the Third District ~~Court of~~ Appeal for a writ of certiorari. The Third District issued a detailed opinion which upheld the zoning affirmance and expressly found, among other

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[3] In addition to the stadium, the approval included other transitional type uses such as low density office park uses and a neighborhood park buffer to be maintained at the sole expense of the zoning applicant. *See* County's Answer Brief below, p. 12-14 and Op. 1362.

[4] The pre-approval litigation was designated by the Eleventh Circuit as "Rolling Oaks I," and "Rolling Oaks II," and the zoning appeal was described by the appellate court as "Norwood-Norland I" and "Norwood-Norland II", op. at 1363-1365. These designations are sometimes used in this Petition.

things,[5] that the County Commission's zoning hearing had afforded procedural due process to Respondents. The opinion was necessarily predicated upon there being neither a taking nor discrimination, because under Florida law such an infirmity would have required that the zoning be overturned.[6] Significantly, at no time during the state litigation did Respondents announce any reservation of issues for federal adjudication.[7]

After their petition for certiorari to the Florida Supreme Court was denied, Respondents elected *not* to seek review in the United States Supreme Court. Instead they filed a civil rights action in the United States District Court for the Southern District of Florida, seeking damages resulting from the *same* County zoning approval that had been upheld in the Florida courts. The federal complaint was based on the same contentions on which Respondents failed to succeed in the Florida courts.

Respondents' asserted basis of federal jurisdiction was a civil rights claim under 42 U.S.C. §1983, *et seq.* and 28 U.S.C. §1331 (federal question) and §1343 (civil rights), predicated upon alleged impairment of contract rights (Count I), substantive invalidity of zoning (Count II), and

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[5] The state court also approved the release of a restrictive covenant applicable solely to the property of the zoning applicant.

[6] See discussion at p. 10-15, *infra*.

[7] See *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

discrimination (Count III).[8] Petitioners moved to dismiss on the basis of *res judicata*, collateral estoppel and abstention, among other grounds. After properly treating Petitioners' Motions to Dismiss as Motions for Summary Judgment, Op. at 1365 n.5, the district court held that Counts I and II were barred by principles of collateral estoppel and/or *res judicata*, and that Count III should be dismissed.[9]

Respondents appealed the district court's order to the Eleventh Circuit Court of Appeals.[10] The three judge panel of the Eleventh Circuit[11] upheld in part the district court's dismissal based upon preclusion of the substantive due process (zoning validity) and impairment of

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[8] The Eleventh Circuit later inferred that Count II of the complaint "also apparently" sought damages for a "taking" without just compensation, although a taking, as such, was not alleged. Op. at 1369.

[9] The Eleventh Circuit characterized the dismissal of Count III as based on both *res judicata* and abstention. Op. at 1365. Petitioners have contended throughout this litigation that Count III was barred by preclusion principles. *See* Op. at 1373.

[10] After it became clear at oral argument that Respondents were asking the circuit court to reverse express state court adjudications, Dade County, joined by the other Petitioners, filed a motion to dismiss the appeal for lack of subject matter jurisdiction. Although found not to be frivolous, the motion was denied. Op. at 1374 n.15.

[11] The opinion was authored by the Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation. Op. at 1361-62.

contract (release of covenant) claims.[12] The court, however, reversed the district court as to the taking and discrimination claims (Counts II and III, respectively). The basis for reversal on the taking issue was that it "was not raised" in the zoning appeal. Op. at 1368. The basis for reversal on the discrimination claim was: (1) Respondents' *failure to assert* all of its contentions in the state litigation ("different allegations"); and (2) the Eleventh Circuit's *reversal of the state appellate court* on the procedural due process issue (discussed below). Op. at 1373.

Regarding "different allegations" of discrimination, Respondents placed nothing in the record to demonstrate that their contentions in the federal complaint were substantively any different from those before the state courts. Regarding procedural due process before the County Commission, the Florida Third District Court of Appeal had expressly rejected Respondents' claim:

> Neither do we find *any* denial of petitioners' *procedural due process* rights in *any* of the proceedings leading up to the County Commission's adoption of the zoning resolution.

511 So.2d at 1013 (emphasis supplied). In reversing the district court, the Eleventh Circuit panel made *its own findings of fact* regarding the procedural due process issue, and *expressly reversed the state appellate court's prior adjudication*:

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[12] Because the state adjudications upholding both the zoning and the release of the restrictive covenant were left undisturbed by the Eleventh Circuit, these matters are not in issue here.

> Thus, it is necessary to examine the "procedural due process which is afforded to the interested parties[.]". . . .A review of the transcript of the [County Commission's zoning] hearing . . . reveals that that proceeding fell far short of meeting those judicial-type standards.

Op. at 1367.[13]

Petitioners filed petitions for rehearing and suggestions of *en banc* consideration, calling the circuit court's attention to the fact that reversal of the state adjudications was in direct conflict with decisions of the Supreme Court. Said motions were summarily denied (see App. 3(B).

Faced with a one hundred million dollar ($100,000,000) civil rights claim predicated on contentions which, if valid, would have *required nullification* of the zoning by the state courts in Respondents' state zoning appeal, Dade County, joined by other Petitioners, has filed the petition at bar.

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[13] The court concluded from the transcript that Respondents, who were objectors at the zoning hearing, had, themselves, been disruptive and not sought to do any cross-examination, including interrogation of their *own witness*. See Op. at 1367 and discussion of Jackson testimony, *infra* at p. 20.

REASONS FOR GRANTING THE WRIT

WHEN STATE APPELLATE COURTS UPHOLD ZONING WHICH THEY MUST OTHERWISE NULLIFY IF THE ZONING VIOLATES CONSTITUTIONAL RIGHTS, A FEDERAL APPEALS COURT LACKS JURISDICTION TO REVIEW AND REVERSE STATE ADJUDICATIONS AS THE BASIS FOR PERMITTING A SUBSEQUENT CIVIL RIGHTS DAMAGE CLAIM.

A. Introduction

The Florida Third District Court of Appeal was required to overturn the zoning approval if either: (1) procedural due process had been denied before the County Commission; (2) the zoning created a taking; or (3) the zoning resulted in discrimination. The Eleventh Circuit reversed the Florida appellate courts on all three issues as the basis for allowing Plaintiffs' federal civil rights claim to go forward against Dade County, a political subdivision of the State of Florida, and other defendants.

In reversing the state courts, the Eleventh Circuit violated the limits of lower federal court jurisdiction as enunciated in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), and *Migra v. Warren City School District Board of Education*, 465 U.S. 79, 104 S.Ct. 892, 75 L.Ed.2d 56 (1984).

Respondents *elected* to litigate first in the state court. Central to the Eleventh Circuit's opinion is the conclusion

that Respondents *failed to assert* their taking and discrimination claims during the state litigation. *See* Op. at 1368 as to taking ("that . . . issue was not raised"), *and* Op. at 1373 as to civil rights ("different allegations"). The opinion is an open invitation to all litigants to "entrap" state courts into upholding zoning or other action that would *otherwise be nullified if the constitutional claims were, first, presented and, second, found to have merit.* This exposes local governments throughout the Eleventh Circuit and potentially nationwide to liability in the lower federal courts for untold hundreds of millions of dollars to compensate for damages that would otherwise have been non-existent.

The violence done by the opinion to basic constraints on lower federal court jurisdiction significantly and detrimentally impairs the ability of local governments to manage their public affairs. Moreover, the Eleventh Circuit's decision does great damage to both the federal and state judiciaries, rendering state court labors superfluous and immeasurably enlarging the caseload of the federal courts.

If certiorari review is not granted at this time the Eleventh Circuit's opinion will become law of the case and Petitioners, if faced with a damage judgment, will be unable to then obtain review of the opinion.

B. Florida Courts Must Nullify Zoning Where There Is A Denial Of Procedural Due Process, A Taking, Or Discrimination.

Florida case law, which controlled the adjudication of Respondents' state zoning appeal, would have required

the state courts to have overturned the zoning if there had been a denial of procedural due process, a taking, or discrimination. If a Florida district court of appeal affirms zoning without resolving good faith contentions of a constitutional violation, the Florida Supreme Court will require a remand to an *inferior tribunal to conduct whatever proceedings are necessary to determine the constitutional issue.* This could include remand not only to the circuit court but, if necessary, to the County Commission, a judge, or a special master. *See Dade County v. National Bulk Carriers, Inc.*, 450 So.2d 213 (Fla. 1984), discussed *infra* at 12, 13, 22.

The following controlling Florida case law was acknowledged, but not honored, by the Eleventh Circuit.

1. In the state court appeals taken by Respondents "Florida law does not call for its courts to rubber-stamp administrative zoning actions, but rather *carefully to consider their validity* or invalidity." Op. at 1369 citing *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*, 361 So.2d 695, 698-99 (Fla. 1978) (emphasis supplied)

2. State appellate review *"must* determine whether [in the administrative proceeding] *procedural due process* is accorded, [and] whether the *essential requirements of the law* have been observed. . . ." Op. at 1369 *citing* both the Florida Supreme Court and *Norwood-Norland II, Plaintiffs' zoning appeal* (emphasis supplied). The Eleventh Circuit therefore explicitly recognized that the issue of denial of procedural due process was integral to the Third District Court of Appeal's affirmance of the zoning approval, and that said court had a duty to reverse had there been a denial thereof.

With regard to the procedures used at the County Commission hearing, Dade County, Florida is a charter county operating under the "Home Rule" provisions of the Florida Constitution, Article VIII, Section 6. Under Home Rule procedures, a zoning hearing before the Dade County Commission results in a resolution granting or denying a specific application. A zoning resolution is only adopted after an advertised public hearing with the opportunity for compulsory attendance of witnesses, sworn testimony, cross-examination, a required court reporter, and a record. See Section 33-316, Dade County Code (App. 4(C)(2)). Consequently, Dade County zoning hearings have been adjudicated to be in the nature of judicial hearings. *Rinker Materials Corp. v. Metropolitan Dade County*, 528 So.2d 904, 906 (Fla. 3d DCA 1987); *Coral Reef Nurseries, Inc. v. Babcock Co.*, 410 So.2d 648, 653 (Fla. 3d DCA 1982); *Dade County v. Yumbo, S.A.*, 348 So.2d 392, 394 (Fla. 3d DCA 1977).

The Eleventh Circuit opinion also observed, but did not honor, the following essential requirements of Florida *zoning* law, as opposed to "permitting" law:

a. " '[a] zoning ordinance is, by definition, *invalid if it is confiscatory,*' " Op. 1371 *quoting* Florida decisions including *Dade County v. National Bulk Carriers, Inc.*, 450 So.2d 213, 215-216 (Fla. 1984).

b. when a taking is asserted in a zoning appeal the matter must be remanded to the extent necessary to make "a determination of whether the county's action is confiscatory and *constitutes a taking* without just compensation, in which event *the action of the Board must be stricken.*" Op. 1371 quoting *National*

Bulk Carriers, supra, 450 So.2d at 216 (emphasis supplied).

c. In Florida a zoning action, unlike all other *permitting* actions, 'cannot be both reasonable and confiscatory.' " *Id.*

d. In Florida zoning appeals the principle that a court should not substitute its judgment for the zoning authority is limited to circumstances 'where the administrative action is *not . . . discriminatory . . .* ' " Op. 1369 citing decisions of the Florida Third District Court of Appeal, including *Metropolitan Dade County v. Brisker,* 485 So.2d 1349, 1351 (Fla. 3d DCA 1986).

Brisker overturned Dade County zoning because of *"discriminatory* circumstances," which necessarily made the zoning not "fairly debatable." 485 So.2d 1349 at 1351 (emphasis supplied). *Accord, Machado v. Musgrove,* 519 So.2d 629, 635 (Fla. 3d DCA 1988): (unanimous *en banc* recognition that, notwithstanding Dade County's master plan and state legislation, the court had the *"inherent power* to take into account fundamental *fairness* [*i.e.* due process and discrimination] questions . . . or that the plan, in its application, would constitute a *taking* of private property without due process or fair compensation" (emphasis supplied).

In addition to the common law prohibition against a taking in Florida, the Florida Third District Court of Appeal in *Norwood-Norland II,* Respondents' zoning appeal, recognized that *a statutory prohibition against a taking* was expressly incorporated into the standard of judicial review. *See* 511 So.2d 1009 at 1013, *quoting* Section 163.3194(4)(a), Fla. Stat., which mandates: "A court, in

reviewing local governmental action or development regulation [shall assure that] *property shall not be taken* without due process of law and the payment of just compensation." (emphasis supplied).

Ironically, the Eleventh Circuit opinion recognizes Florida caselaw requiring that if a County Commission hearing falls short of affording procedural due process or results in discrimination or a taking, the Florida courts must reverse the zoning decision, thereby eliminating any injury. Instead of affording full faith and credit to this process and Florida adjudications pursuant thereto, the Eleventh Circuit reversed, leaving the state-litigated zoning intact, but permitting a civil rights damage claim in the federal court that is irreconcilable with the state adjudications.[14] This result also contradicts the Eleventh Circuit's acknowledgement that:

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[14] In allowing the taking claim to proceed, the opinion mistakenly relies upon *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987). The opinion notes *Corn's* conclusion that the federal court must provide a remedy because "Florida does not avail a property owner an action to recover just compensation through inverse condemnation for injuries sustained as a result of an *unreasonable zoning ordinance later declared [by Florida courts] invalid.*" Op. at 1372, *citing Corn*, 816 F.2d at 1519. (emphasis supplied)

First, there is no longer an absence of a monetary remedy in the Florida courts in light of the Supreme Court's mandate in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, ___ U.S.___, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). A more critical distinction, however, is that in *Corn* it was *"the state court [that first] struck the new zoning ordinances as invalid."* 816 F.2d at 1515 (emphasis supplied). It was

(Continued on following page)

> . . . Like the district court, we are convinced that "[t]here is absolutely no reason why the courts of the State of Florida are any less competent than [f]ederal Court to adjudicate the civil rights claim at issue," Op. 1374 quoting district judge's opinion.

C. Conflict With Supreme Court Decisions

The appeals court violated decisions of the Supreme Court and exceeded its jurisdiction by reviewing and reversing a state appellate court both on matters expressly adjudicated and on other matters inextricably intertwined with the state court adjudication.

In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), the Supreme Court found lower federal court review of state adjudications to be jurisdictionally prohibited. Here, the Eleventh Circuit's express reversal of the Florida appellate court's adjudication that procedural due process had been afforded Respondents is in direct conflict with *Rooker*.

Rooker was reaffirmed in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), which held that United State district courts "do not have jurisdiction, however, over challenges to

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(Continued from previous page)

the *favorable state court result*, absent in the present cause, that paved the way for the exercise of federal district court jurisdiction over Mr. Corn's damage claim. Here Respondents come to the federal court with multiple *adverse* state adjudications which negate the existence of a taking. Unlike Mr. Corn, Respondents in this cause obtained a lower federal court reversal of a state court adjudication.

state-court decisions in particular cases arising out of judicial proceedings *even if those challenges allege that the state court's action was unconstitutional.* Review of those decisions may be had only in this Court." 460 U.S. at 486, 103 S.Ct. at 1317, 75 L.Ed.2d at 225 (emphasis added).

The *Feldman* court was careful to articulate *the obligation upon a state court litigant to raise federal issues in the state court:*

> The Court of Appeals' reasoning in *Dasher [Dasher v. Supreme Court of Texas,* 658 F.2d 1045 (5th Cir. 1981)] is flawed. As we noted in *Atlantic Coast Line R. Co. v. Locomotive Engineers,* 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970), "lower federal courts possess no power whatever to sit in direct review of state court decisions." *Id.,* at 296, 90 S.Ct., at 1748. If the constitutional claims presented to a United States District Court are *inextricably intertwined* with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the District Court is in essence being called upon to review the state-court decision. This the District Court may not do.
>
> Moreover, the fact that we may not have jurisdiction to review a final state-court judgment because of a petitioner's failure to raise his constitutional claims in state court does not mean that a United States district court should have jurisdiction over the claims. *By failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state-court decision in any federal court. This result is eminently defensible on policy grounds. We have noted the competence of state courts to adjudicate federal constitutional claims. . . .* (citation omitted).

460 U.S. at 482 n.16, 103 S.Ct. at 1315 n.16 (emphasis added).

The *Feldman* rule sets a limit of lower federal court jurisdiction independent of "whether the doctrine of *res judicata* forecloses litigation." *See Feldman*, 460 U.S. at 487, 103 S.Ct. at 1317, 75 L.Ed.2d at 226.[15] The Eleventh Circuit opinion, which includes an extensive discussion of preclusion principles, Op. at 1366-1368, omits any mention of *Feldman*.[16]

As shown *supra*, the state courts adjudicating Respondents' zoning appeal were required to overturn the zoning if there was either a denial of procedural due process, a denial of equal protection, or a taking. To now allow the readjudication of any of the foregoing issues is to attempt to extricate the essential predicate of those adjudications, without which they could not exist.

Respectfully, it is hard to imagine how issues could be more "inextricably intertwined" with state adjudications. If Respondents are adjudicated to be right in the federal court on either their taking or discrimination claim it necessarily follows that the state courts were wrong in upholding the zoning. "While the question whether a federal constitutional challenge is inextricably

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[15] A separate holding in *Feldman* that the district court could consider administrative matters not judicially reviewed by the District of Columbia "state" courts has no applicability at bar because this cause has been extensively litigated in the appellate courts of the State of Florida.

[16] *Feldman* was repeatedly called to the circuit court's attention in Respondents' Briefs' post-oral argument motion to dismiss, and Motions for Rehearing and Suggestions of *En Banc* consideration.

intertwined with the merits of a state-court judgment may sometimes be difficult to answer, it is apparent, as a first step, that the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment. *Pennzoil Co. v. Texaco, Inc.*, ___U.S.___, 107 S.Ct. 1519, 1533 (1987) (Marshall, J., concurring).

In *Migra v. Warren City School District Board of Education*, 465 U.S. 79, 79 L.Ed.2d 56, 104 S.Ct. 892 (1984), the United States Supreme Court extended the application of state *res judicata* and collateral estoppel principles to 42 U.S.C. § 1983 claims which a litigant either raised or *could have raised* but did not raise in an earlier state-court proceeding. 465 U.S. at 87, 104 S.Ct. at 899, 79 L.Ed.2d at 66. As recognized, but not honored, by the Eleventh Circuit Court of Appeals below, "pursuant to the Full Faith and Credit Clause of the Constitution, art. IV, §1, and the federal full faith and credit statute, 28 U.S.C. §1738, '[i]t is now settled that a federal court must give to a state-court judgment *the same preclusive effect* as would be given that judgment under the law of the state in which the judgment was rendered.' " Op. at 1366 (emphasis supplied) quoting *Migra*, 465 U.S. at 81, 104 S.Ct. at 896.

Respondents, as had Dr. Migra, elected to go forward with state court proceedings and adjudications prior to commencing the federal action. Florida caselaw assured

Respondents every opportunity to assert their taking and discrimination claims in their state zoning appeal as sufficient grounds for *nullifying* the zoning. Although the opportunity to raise the issue in the state courts in itself satisfies preclusion principles and required the district court's dismissal of the complaint, there are two further errors in the Eleventh Circuit's reversal.

First, there was no basis for the Eleventh Circuit's factual conclusion that Respondents' federal discrimination claim contains "different allegations" from those before the state court. Op. at 1373. The Eleventh Circuit affirmed the district court's procedure in entering summary judgment. Respondents placed nothing in the record to indicate that the substance of their federal complaint varied in any substantive way from their contentions before the Florida courts. If the circuit court was dissatisfied with the summary judgment it should not have substituted its own findings of fact. At most, it should have remanded for an evidentiary hearing before the district court.

There was a clear opportunity for Respondents to either disclaim or litigate dispositive discrimination issues in the state proceedings. At the outset of state proceedings, Respondents expressly disclaimed any issue of discrimination. Subsequently, they litigated the issue before the Florida Third District Court of Appeal. Having *both disclaimed and then litigated* the discrimination issues,

Respondents now seek a *third* "day in court" – this time federal district court – on the same issue.[17]

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[17] At the County Commission hearing, Respondents' attorneys, who also represented them below, acknowledged that the discrimination issue could be raised and then expressly waived the same as follows:

> *Nobody, nobody* in Rolling Oaks, Crestview, Norland, Norwood, or Lake Lucerne *in any position of responsibility has ever called Joe Robbie a racist. That is, not a question today, yesterday, or tomorrow.*
>
> The question is: on balance, economic progress . . . . (T.203)

Respondents' other counsel of record made the following admission:

> Now, my presentation is not going to be lengthy, but I think that there is one more question that needs to be addressed *for the record.*
>
> *Any suggestions concerning racism* that has been made, to my knowledge, and certainly that has appeared on the public record, *was not related to the racism;* it was related to insensitivity. . . . (T.239)

Respondents' witness, Reverend Jessie Jackson, acknowledged:

> I regret very much since I have friends on both sides of this argument; there is no situation of the good guys on the one side and the bad guys on the other side; and that is really not what is being said. (T.70)

Section 33-302(k) of the Dade County Code provides for the compilation of an exhaustive record before the County Commission and Respondents later argued to the Florida Third

(Continued on following page)

Regarding the taking issue, the Eleventh Circuit opinion erroneously cites *Albrecht v. State*, 444 So.2d 8, 12

(Continued from previous page)

District Court of Appeal that they had in fact made a record on discrimination. (See this footnote, *infra*).

Respondents' first appeal was to the Circuit Court in Dade County. Although Respondents indicated to the Circuit Court that they had filed a *separate* civil rights claim of some kind in the *state* court, they induced the Court to assume that the matter was not integral to the zoning appeal and therefore properly belonged in a separate state court action. (See extensive analysis of this issue at p.9 of County's brief to 11th Circuit.)

Directly and forcefully litigating the discrimination issue before the Third District Court of Appeal, Respondents argued:

> The holding in this case conflicts with the holding of this court in *Metropolitan Dade County v. Brisker*, 485 So.2d 1349 (Fla. 3d DCA 1986). In *Brisker* this court decided an appeal adverse to the county *solely on equal protection grounds*, agreeing with the Circuit Court that the zoning resolution infringed upon the landowners' constitutionally protected property rights and was *discriminatory*. (emphasis supplied).
>
> Here there is undisputed evidence of substantive due process and equal protection violations. That evidence consists of the official reports of the South Florida Regional Planning Council and the United States Civil Rights Commission, and proof by case law of disparate treatment accorded petitioners in comparison with treatment accorded to nearby predominantly white communities. (R, Vol. II, It. 13, Exh. 3, p.11).

That Respondents' discrimination arguments were rejected by the state courts is entirely reasonable. In light of their

(Continued on following page)

(Fla. 1984), as grounds for believing the taking issue would not be afforded *res judicata* effect in Florida as a result of Respondents' zoning appeal. Op. at 1366. First, *Feldman* applies to the federal court independently of state *res judicata* principles. Second, the court apparently overlooked the Florida Supreme Court's critical distinction that *Albrecht* was *not* a zoning case (wherein zoning must be nullified if a taking results) but a permit case (where a confiscatory permit decision is allowed to stand because compensation will be paid).[18]

Clearly, the adjudications in Respondents' Florida zoning appeal would have preclusive effect in Florida with regard to any subsequent attempt to assert a constitutional violation as the basis for a damage claim arising out of the zoning resolution. See, e.g., *Kasser v. Dade County*, 344 So.2d 928 (Fla. 3d DCA 1977), in which the Third District Court of Appeal upheld the dismissal with prejudice of a "complaint [which] challenges the *confiscatory* nature of the [zoning] resolution." The Court

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(Continued from previous page)

express and emphatic disclaimer of discrimination made on the record before County Commission, Respondents, if they did not legally waive the issue, factually negated their own contentions.

[18] In *Dade County v. National Bulk Carriers*, 450 So.2d 213, 215-16 (Fla. 1984), the Florida Supreme Court distinguished *Albrecht* and other permit cases from zoning cases as follows: "Under the type of statutory permitting scheme involved in *Key Haven, Albrecht,* and *Graham v Estuary*, it was contemplated that its application may result in a taking. Such is *not the case in the application of a zoning ordinance.*" (emphasis supplied).

observed that "Section 33-316 of the Code of Metropolitan Dade County, provides that review [shall be] in the Circuit Court for Dade County," and that "[s]uch a challenge *would have served as a basis for review by the Circuit Court.*" *Id.* at 929.

D. The Unauthorized Extension of Lower Federal Court Jurisdiction Creates Widespread Uncertainty and Financial Risk for Local Governments, Renders Useless the Efforts of State Courts, and Increases the Caseload of the Lower Federal Courts.

The opinion encourages the withholding of constitutional issues by state litigants which, in turn, induces state courts to uphold otherwise impermissible exercises of the police power by local governments[19]. The opinion therefore promotes state court exacerbation of constitutional violations, rather than their mitigation or elimination – a result clearly contrary to public policy. *See Feldman, supra* ("[O]ne of the policies underlining the requirement that constitutional claims be raised in state court . . . is the desirability of giving the state court the first opportunity [to rectify constitutional violations] in light of federal constitutional arguments." 460 U.S. 462, 482 n.16, 103 S.Ct. 1315, n.16, 75 L.Ed.2d 206, 223 n.16).

Recognition of a monetary remedy for a confiscatory land use regulation was some 55 years in evolving from

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[19] This assumes *arguendo* that the constitutional issues have merit, a matter which Petitioners at bar adamantly deny.

its postulation by Justice Holmes. Compare *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed.Ed. 322 (1922), with *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, ___ U.S. ___, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). While this Court's recent decision in *First English* requires states to afford a monetary remedy for a regulatory taking, even if temporary, it balances the harshness of that new rule by expressly allowing states to overturn confiscatory regulations and thereby limit damages, ___ U.S. ___, 107 S.Ct. at 2389, 96 L.Ed.2d at 268.

Unless a writ of certiorari is granted, the Opinion will carry the new requirement of *First English* to an extreme that was never contemplated by the Supreme Court and which is at odds with the concept of comity in our federal system. Under what will become the "Lake Lucerne Doctrine", even where a state commits to nullifying unconstitutional zoning, it can effectively be prevented from doing so by the person allegedly damaged. That person need only obfuscate constitutional issues during state litigation in order to bring a damage claim in the lower federal courts. The resultant financial exposure will be devastating to Dade County and other state and local governments who are already pressed to the limit in applying scarce financial resources to monumental urban problems.

The opinion extends the jurisdiction of the lower federal courts to a vast quantity of previously impermissible complaints by unsuccessful state litigants seeking federal adjudication of matters that either were, or should

have been, presented to the state court. Now, federal courts will be adjudicating matters that were either expressly adjudicated by state courts, or were inextricably intertwined with such state adjudications. The efforts of state courts will be rendered useless and the caseload of lower federal courts will be substantially increased.

CONCLUSION

The opinion below constitutes a drastic departure by the Eleventh Circuit from the accepted and usual course of judicial proceedings as prescribed by Supreme Court opinions. This departure has occurred in a matter of exceptional public importance justifying certiorari review

by the Supreme Court in the exercise of its powers of supervision.

Respectfully submitted,

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December 29, 1989

*Counsel of Record

No. _____

In The

Supreme Court of the United States

October Term, 1989

DADE COUNTY, a political subdivision of the State of Florida; DOLPHIN STADIUM CORPORATION, a Florida corporation; JOSEPH ROBBIE; LAWRENCE MORTON, EMIL MORTON, individually and as Trustee, ALAN MORTON, MAX BODERMAN, d/b/a MORTON PROPERTIES,

Petitioners,

vs.

LAKE LUCERNE CIVIC ASSN., INC.; CRESTVIEW HOMEOWNERS' ASSN., INC.; ROLLING OAKS HOMEOWNERS' ASSN., INC.; MILDRED HARRIS; BARRY YOUNG; and NORINE FLETCHER,

Respondents.

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LAKE LUCERNE CIVIC ASSOCIATION, INC., et al., Plaintiffs-Appellants,

v.

DOLPHIN STADIUM CORP., et al., Defendants-Appellees.

No. 88-5383.

United States Court of Appeals, Eleventh Circuit.

Aug. 3, 1989.

Florida property owners brought action challenging rezoning of county land for sports stadium complex, claiming that rezoning impaired their contract rights and violated substantive due process and their civil rights. The United States District Court for the Southern District of Florida, No. 87-1546-CIV, Eugene P. Spellman, J., entered summary judgment against property owners, and they appealed. The Court of Appeals, Frank A. Kaufman, Senior District Judge, sitting by designation, held that: (1) initial state litigation did not preclude instant suit; (2) county zoning hearing did not have preclusive effect; (3) subsequent state litigation precluded impairment of contract and substantive due process claims; (4) taking claim was not precluded; and (5) abstention under *Colorado River* was not appropriate with respect to discrimination claim.

Affirmed in part; reversed in part and remanded.

H.T. Smith, George F. Knox, Long & Knox, P.A., Miami, Fla., for plaintiffs-appellants.

Glenn J. Waldman, Stroock & Stroock & Lavan, Robert L. Shevin, Miami, Fla., for Dolphin & Robbie.

Samuel S. Goren, Josias & Goren, P.A., Ft. Lauderdale, Fla., for South Florida Regional Planning Council.

Robert L. Krawcheck, Dade County Atty., Miami, Fla., for Dade County.

Stephen H. Reisman, Rosenberg & Reisman, Miami, Fla., for Mortons, Boderman.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY, Chief Judge,
VANCE, Circuit Judge, and

KAUFMAN*, Senior District Judge.

KAUFMAN, Senior District Judge.

The institution of this federal case is the latest round of litigation following a series of state trial and appellate court proceedings related to the construction of a new sports stadium complex in Dade County, Florida. In this federal case, appellants, three individual homeowners and three homeowner associations,[1] assert that their

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* Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

[1] While neither the court below nor any appellee has questioned the standing of any appellant, this Court notes that that question might be raised as to certain of the corporate appellants. However, because each of the individual appellants possesses standing, and because all appellants are asserting the

(Continued on following page)

contract rights have been unconstitutionally impaired (Count I), that the applicable zoning resolution of the Board of Commissioners of Dade County was adopted in violation of appellants' substantive due process rights (Count II), and (in Count III) that appellants' "civil rights have been abrogated" by appellee Dade County and by other defendants acting "under color of [state] law" by "a stark pattern of discriminatory practices affecting the property and housing rights of black citizens." Appellants seek declaratory and equitable relief, monetary damages, attorney's fees and costs and have prayed a jury trial. Jurisdiction is asserted, and is present, under 28 U.S.C. § 1331 and § 1343.

Appellees are Dade County, Florida, South Florida Regional Council, the Dolphin Stadium Corporation, and individuals and trustees alleged to be developers of the stadium and adjacent commercial enterprises associated with the stadium complex.[2] The district court granted summary judgment for appellees and assessed costs against appellants.

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same grounds for relief, it is not necessary for this Court to inquire concerning the standing of the corporate appellants. *See Carey v. Population Services International*, 431 U.S. 678, 682, 97 S.Ct. 2010, 2014, 52 L.Ed.2d 675 (1977).

[2] Whether appellants have stated, or even have intended to state, each and all of their allegations against each appellee is not clear from the record before us and should be clarified by the district court on remand.

Factual and Procedural Background

The stadium complex includes the home of the Miami Dolphins professional football team plus a commercial and industrial development. It is located on more than 430 acres in an area in northwestern Dade County known as Lake Lucerne. The land for the project was donated, subject to certain rights of reversion, by certain of the individual and/or trustee appellees to the County, which in turn leased it to appellee Dolphin Stadium Corporation.

In 1977, the property, then owned by certain of the appellees, was rezoned from agricultural to single-family and townhouse use. At that time, pursuant to the request of the Dade County Board of County Commissioners, the owners subjected the property to a covenant restricting its commercial use. That covenant included the following provision:

> This Agreement may be modified, amended, or released as to any portion of the land described herein by a written instrument executed by the then-owner of the fee-simple title to the lands to be affected by such modification, amendment or release, along with a majority of the property owners within 350 ft. of the property for which such modification is proposed, as well as along with a majority of the property within 350 ft. of the property shown in the [Metropolitan Dade County Comprehensive Development Master] Plan, and approved after public hearing by Resolution of the Board of County Commissioners or Zoning Appeals Board of Metropolitan Dade County, Florida, whichever by law has jurisdiction over such subject matter.

Subsequently, after plans were formulated for what has now become the stadium complex, the developers were apparently unable to obtain the necessary consents to obtain release of the restrictive covenant as to the entire desired area. Therefore, they reduced the area requested for rezoning by creating a 351 foot setback from two nearby housing developments, thus eliminating the need for consents from the property owners in that setback area. Also, the developers construed the restrictive covenant as assigning to the owner of each parcel of land, including Dade County and the State of Florida, one vote per parcel regardless of how many parcels that person owned. Pursuant to that construction, the developers obtained the consents of the owners of 111 out of a total of 161 parcels in the reduced area – more than a majority vote of the owners on a parcel-by-parcel basis, but the votes of only 18 of the 55 owners of all of the parcels – far short of a majority of such owners.

The "Rolling Oaks" Litigation

In Mildred Harris, et al. v. Dade County, et al. ("Rolling Oaks I"), filed December 21, 1984 in the Circuit Court for Dade County, two of the three individual appellants and one of three corporate appellants in this appeal brought suit for equitable and legal relief, seeking to prevent construction of the stadium project. Defendants in that case were all of appellees in this federal action. On August 23, 1985, the circuit court dismissed, with prejudice, four counts of the nine-count complaint, and dismissed the five other counts as premature, with leave to amend. With respect to the dismissals with prejudice, the

circuit court concluded that: (1) Count I, in which plaintiffs contended that the gift of public land to a private for-profit development was not a proper public purpose, was without merit because the need for a sports stadium constituted a proper public purpose, even if the stadium was being developed by a private party; (2) Count II, in which plaintiffs alleged lack of proper notice of a public hearing, did not entitle appellants to relief because Dade County had properly exercised its discretionary powers and because the notice and hearing requirements did not apply to county land conveyed for the purposes involved; (3) Count III, in which plaintiffs asserted an illegal contract for zoning, did not state a ground for relief because the Dade County zoning authorities had not contractually obligated themselves to make any zoning change; and (4) Count VIII, in which it was alleged that the law requiring bidding for acquisition of county property had been disregarded, failed to state a cause of action because the applicable law, as was the case with Count II, did not apply to county land conveyed by the County for the specific purpose involved.

With respect to the counts in *Rolling Oaks I* held to be premature and dismissed with leave to amend after final action by the Dade County Board of County Commissioners, the circuit court concluded: (1) Count IV, in which it was contended that appellees were prohibited by the restrictive covenant from making a zoning change, provided no basis for relief because that covenant itself expressly provided for modification, and because "[a]ny judicial determination of the continued viability of the restrictive covenant prior to a final administrative action rezoning the subject property would be unnecessary and

premature";[3] (2) Count V, in which it was alleged that the promised rezoning was substantially invalid, was not meritorious because no final action had been taken by the Board of County Commissioners and because administrative remedies in that regard had not been exhausted; (3) Count VI, in which plaintiffs asserted a violation of the law prohibiting the obligation by the County of unapproved funds and the pledging of the County's credit, could not be maintained prior to such expenditure or contract to expend public funds; (4) Count VII, in which plaintiffs claimed that the County violated an industrial revenue bonds statute, did not state a basis for immediate relief because the stadium, as a public project, qualified for the issuance of industrial revenue bonds, and because a suit seeking declaratory judgment concerning the validity of any such bond issue would constitute an advisory opinion; and (5) Count IX, in which it was urged that the rezoning constituted a taking without just compensation, was prematurely stated pending application of the zoning ordinance to plaintiffs' property.

On appeal, in *Rolling Oaks Homeowner's Ass'n, Inc., et al. v. Dade County, et al.*, 492 So.2d 686 (Fla. 3d D.C.A.1986) ("*Rolling Oaks II*"), in a per curiam opinion filed June 26, 1986, the District Court of Appeal for the Third District concluded that the five counts dismissed as premature with leave to amend should have instead been dismissed without leave to amend, "allowing the refiling of a new suit if, as and when such alleged causes of

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[3] *Rolling Oaks I* at p. 13. Copies of the opinions in *Rolling Oaks I* and in *Norwood-Norland I, see infra* at p. 1364, and of Judge Spellman's opinion below are in the record in this case.

action mature." *Id.*, at 688. The district court also held that Count VIII was not prematurely brought and remanded that claim for further consideration by the circuit court. Otherwise, the district court affirmed the circuit court's holdings.[4]

The Zoning Hearing

On September 26, 1985, after the decision in *Rolling Oaks I* and before the decision in *Rolling Oaks II*, a rezoning hearing took place before the Dade County Board of County Commissioners. During that hearing, some of appellants in this appeal, several county officials, certain attorneys, some of whom are of counsel in this appeal, residents and community leaders supporting and opposing the stadium project, and the Reverend Jesse Jackson testified. The restrictive covenant and whether it had been properly released were discussed at length.

The hearing concluded late at night after the Board of County Commissioners passed and adopted a zoning resolution by vote of 7-1, with one commissioner absent, changing the zoning for several plots within the area of the stadium complex from residential to commercial and/or industrial use, and designating certain land for stadium use. Promulgated along with that zoning action was a Development of Regional Impact Order relating to air and light and providing for noise and pollution barriers

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[4] There is nothing in the record before us to indicate whether there has ever been any further consideration by any Florida court of any issue not determined on a final basis in *Rolling Oaks I* and *II* or of any issue remanded in that litigation by the district court to the circuit court.

and adequate parking facilities. Compliance with that Order was required before construction of the stadium complex could be commenced.

The "Norwood-Norland" Litigation

Certain of the present appellants and other homeowners and homeowner associations filed an appeal in a Florida circuit court concerning the zoning action. In that case, *Norwood-Norland Homeowners' Ass'n, Inc., et al. v. Dade County, et al.* ("*Norwood-Norland I*"), those plaintiffs challenged the rezoning as an improper deviation from the Dade County Master Plan, and also asserted the wrongful termination of the restrictive covenant by the County Commissioners.

In an opinion filed on August 18, 1986, a three-judge circuit court panel held that the property in question had been designated in the Master Plan as a Sub-Metro Activities Center, and that the building of a sports complex did not constitute a deviation from that Plan. Noting that its function was to "determine whether the zoning changes are a reasonable and appropriate exercise of legislative power, and whether the zoning is fairly debatable," the circuit court concluded that reasonable minds could differ as to whether the resolution bore a "substantial relationship to the public welfare" and upheld the rezoning on that basis.

With respect to the release of the restrictive covenant, the circuit court, with one judge dissenting, determined that the County's construction of the covenant was entitled to great deference and that appellants had failed to

meet their burden of showing that the County's construction of the covenant permitting one vote per parcel, and voting by Dade County and the State of Florida, was clearly erroneous.

Thereafter, in *Norwood-Norland Homeowners' Ass'n, Inc., et al. v. Dade County, et al.*, 511 So.2d 1009 (Fla. 3d D.C.A.1987), *review denied*, 520 So.2d 585 (Fla.1988) ("*Norwood-Norland II*"), the district court denied a petition for certiorari review of the circuit court's opinion, writing:

> The circuit court is charged with determining whether the agency or municipality accorded procedural due process rights, observed the essential requirements of law, and supported its findings with substantial, competent evidence. It is axiomatic that "zoning or rezoning is the function of the appropriate zoning authority and not the courts. . . ." *Skaggs-Albertson's v. ABC Liquors, Inc.*, 363 So.2d 1082, 1091 (Fla.1978). Reviewing courts are not empowered to act as super zoning boards, substituting their judgment for that of the legislative and administrative bodies exercising legitimate objectives. Instead, the scope of review is one which recognizes a zoning authority's power to impose reasonable regulations in furtherance of health, safety and community welfare, and to determine, on the evidence before the court, whether the local authority's zoning decision is "fairly debatable." The "fairly debatable" test asks whether reasonable minds could differ as to the outcome of a hearing. If so, the court should sustain a county commission's resolution.
>
> The scope of *this* court's review of a circuit court order rendered in its appellate capacity in an administrative action is even narrower. . . .[T]his court's review is limited to determining whether procedural due process

> was afforded, and whether the correct law was applied. Petitioners are *not* entitled to a second or third full appeal in this court.
>
> However, . . . the standards do not necessarily end here. When, as appears in this case, the zoning authority has approved a use more *intensive* than that proposed by the plan, the decision must be subject to "stricter scrutiny" than the "fairly debatable" standard contemplates. Zoning decisions must not only meet the "fairly debatable" standard, but they also should be "consistent" with the comprehensive land use plan.

Id. at 1012 (emphasis in original; certain citations omitted).

Post-Construction Events

On June 18, 1987, after the stadium had been constructed, appellants in this action filed a suit in Dade County Circuit Court, namely, *Lake Lucerne, et al. v. Dade County, et al.*, in which they alleged (1) unconstitutional impairment of contract rights; (2) unlawful gift of public property; (3) unlawful public burden created by a private stadium; (4) substantive unconstitutionality of the zoning resolution; and (5) violation of appellants' civil rights. That action was subsequently – and is still – stayed at the request of appellants pending determination of the issues presented in this federal action now before us.

On August 20, 1987, appellants commenced the instant suit in the United States District Court for the Southern District of Florida, asserting: (1) unconstitutional impairment of contract rights; (2) substantive unconstitutionality of the zoning resolution; and (3) civil

rights violations under 42 U.S.C. § 1983, *et al.* In their motions to dismiss treated by Judge Spellman as motions for summary judgment,[5] appellees relied, *inter alia*, upon principles of res judicata, collateral estoppel and abstention.

On March 22, 1988, Judge Spellman granted summary judgment for appellees, holding that Counts I and II were barred by principles of collateral estoppel and/or res judicata, and that as to Count III, principles of res judicata and also of abstention warranted dismissal. Earlier, Judge Spellman had considered appellants' requests for preliminary injunctive relief because of the alleged failure by Dade County and by Dolphin Stadium Corporation to fulfill their obligations concerning adequate parking and adequate safeguards with regard to light, air, noise and pollution. After a nonevidentiary hearing on August 27, 1987, Judge Spellman deferred determination concerning the preliminary injunction motion and, in effect, consolidated the latter with the merit issues which he disposed of on March 22, 1988. It is from that March 22, 1988 determination that this appeal has been taken.

Preclusion Generally

The District Court determined that the doctrines of both res judicata, or claim preclusion, and collateral

[5] Judge Spellman, in the court below, appropriately treated appellees' motions to dismiss as motions for summary judgment after giving appropriate notice to the parties that he would so do.

estoppel, or issue preclusion, applied to Counts I and II.[6] In *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), the Supreme Court "made clear that issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered." *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 83, 104 S.Ct. 892, 897, 79 L.Ed.2d 56 (1984). In *Migra*, the Supreme Court held that the same preclusive effect applied to a claim which "a § 1983 litigant could have raised but did not raise in the earlier state-court proceeding," *Id.*, and that pursuant to the Full Faith and Credit Clause of the Constitution, art. IV, § 1, and the federal full faith and credit statute, 28 U.S. C. § 1738, "[i]t is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." *Id.* at 81, 104 S.Ct. at 896. *See also Gjellum v. City of Birmingham, Alabama*, 829 F.2d 1056, 1060 (11th Cir.1987).

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[6] "Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. This effect is also referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar." *Migra v. Warren City School District Board of Education*, 465 U.S. at 77 n. 1, 104 S.Ct. at 894 n. 1 (citations omitted). *See also* 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4402.

Under Florida law,

> [i]t has been well settled . . . that several conditions must occur simultaneously if a matter is to be made res judicata: identity of the thing sued for; identity of the cause of action; identity of parties; identity of the quality in the person for or against whom the complaint is made. It is also a settled rule that when the second suit is between the same parties, but based upon a different cause of action from the first, the prior judgment will not serve as an estoppel except as to those issues actually litigated and determined in it. . . .The determining factor in deciding whether the cause of action is the same is whether the facts or evidence necessary to maintain the suit are the same in both actions.

Albrecht v. State, 444 So.2d 8, 12 (Fla.1984) (citations omitted). It is in that context that we now examine the preclusive effects of the *Rolling Oaks*, zoning and *Norwood-Norland* proceedings.

Preclusive Effects of the "Rolling Oaks" Litigation

In *Rolling Oaks I* and *II*, direct attacks were made, before rezoning of the Lake Lucerne area, upon the development of the Dolphin stadium complex. In that litigation, five of the counts were deemed premature; accordingly, they could thereafter be appropriately and timely stated in a subsequent court action.[7]

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[7] "In ordinary circumstances a second action on the same claim is not precluded by dismissal of a first action for

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As to the other counts in *Rolling Oaks* I and II, they raised different issues than those presently advanced in the within case. Accordingly, the identity of issues needed for *Rolling Oaks* collaterally to estop the instant suit is not present. Moreover, since this is a separate cause of action, in which substantially different questions are raised, res judicata cannot apply. *Albrecht*, 444 So.2d at 12. In sum, the *Rolling Oaks* litigation does not preclude any of plaintiffs' claims in this federal court action.

Preclusive Effects of the Zoning Hearing

Appellees ask us to treat the September 26, 1985 hearing before the Board of County Commissioners of Dade County as a quasi-judicial proceeding and to apply to that Board's decision the preclusive effect of a state court adjudication. In response, appellants characterize rezoning by the Board as legislative in nature and entitled to no preclusive effect because of the lack of the due process trappings required in a judicial-type proceeding. While we agree with the result sought by appellants, our reasoning is slightly different. "Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative

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prematurity or failure to satisfy a precondition to suit. No more need be done than await maturity, satisfy the precondition, or switch to a different substantive theory that does not depend upon the same precondition." 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4437, p. 347.

agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22, 86 S.Ct. 1545, 1559-60, 16 L.Ed.2d 642 (1966) (footnotes omitted). "When [formality in an administrative hearing] is sufficiently diminished, the administrative decision may not be res judicata. The starting point in drawing the line is the observation that res judicata applies when what the agency does resembles what a trial court does." 4 K. Davis, *Administrative Law Treatise* 52 (2d ed. 1983).

Florida courts have long recognized and applied in appropriate instances administrative preclusion principles to zoning hearings. *See Coral Reef Nurseries, Inc. v. The Babcock Co.*, 410 So.2d 648, 651-53 (Fla. 3d D.C.A.1982) (and cases there cited). Under those principles, it is "the character of the administrative hearing [which] . . . determines . . . the applicability of the doctrine of administrative res judicata." *Coral Reef*, 410 So.2d at 652. Thus, it is necessary to examine the "procedural due process which is afforded to the interested parties," that is, "the safeguards of due notice, a fair opportunity to be heard in person and through counsel, the right to present evidence, and the right to cross-examine adverse witnesses." *Id.* A review of the transcript of the hearing of September 26, 1985 reveals that that proceeding fell far short of meeting those judicial-type standards.

From the beginning, the zoning hearing was a rather raucous affair. Because he had to catch a plane, the Reverend Jesse Jackson was the first formally to speak; he

strongly opposed the project. He was not questioned by the Commissioners or counsel or anyone else. His testimony resembled a presentation before a congressional committee more than testimony in a court of law. After Reverend Jackson left, county officials and attorneys for persons favoring the Dolphin Stadium project spoke. They were repeatedly interrupted by shouts of residents, which in turn caused the Mayor as the Commission chairman to instruct the residents to quiet down and allow the hearing to proceed in a more orderly fashion. Such participation by the opponents of the project, while undeniably unconstructive, hardly amounted to cross-examination. Also, there was no ordered or directed questioning of the witnesses by the Commissioners or anyone else.

More specifically, there was no quasi-judicial treatment of the release of the restrictive covenant during the hearing. Proponents of the project explained to the Commissioners how the release had been validly obtained. They were interrupted by residents in the manner indicated previously, but no discussion of applicable law and facts with reference to the restrictive covenant occurred. Nor is there anything on the record to indicate that the Board considered the authenticity of the consents obtained to release the restrictive covenant.[8] In that

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[8] Appellees argue that the Commissioners must have assumed that the release was valid when they adopted the rezoning resolution. In this sense, say the appellees, the Commissioners considered the 351 foot setback and the method of apportioning votes as well. Since we conclude that the zoning hearing was not conducted in a sufficiently judicial manner to afford to it preclusive effect, we need not reach those contentions of appellees, though they are hardly overly persuasive.

regard, it must be emphasized that such failure did not occur because appellants failed to seize the opportunities to explore that issue; rather, it was the structure of the hearing itself which patently failed to provide those opportunities. The record itself belies appellees' contention that the Commissioners acted in the judicial manner required if a preclusive effect is to be given to administrative action. Accordingly, the zoning determinations do not themselves preclude appellants from making their claims in the instant case.

Preclusive Effects of the "Norwood-Norland" Litigation

After the zoning hearing, the *Norwood-Norland* litigation reached first a Florida circuit court and then a Florida district court. That litigation involved a direct appeal from the zoning action. It did not involve a claim of unconstitutional taking without compensation. That latter issue was not raised until the still pending and stayed state court proceeding and this federal case were filed.

In determining the preclusive effect to be given in this case to *Norwood-Norland I* and *II*, our inquiry is not confined to what was presented and pled during those state court proceedings. Rather, we must also examine the scope of the reviewing authority of those state tribunals, for if those state courts lacked jurisdiction to entertain an appeal from the administrative action an issue presented herein, the determinations of that issue by those state courts cannot have a preclusive effect. "Judicial finality – the predicate for *res judicata* – arises only from a final decision rendered after the parties have been given a

reasonable opportunity to litigate a claim before a court of competent jurisdiction." *Olmstead v. Amoco Oil Co.*, 725 F.2d 627, 632 (11th Cir.1984), *quoting Kaspar Wire Works, Inc. v. Leco Engineering & Machine*, 575 F.2d 530, 537-38 (5th Cir.1978) *See Davis V. Dieujuste*, 496 So.2d 806, 808-10 (Fla.1986); *Estate of Paulk v. Lindamood*, 529 So.2d 1150, 1154 (Fla. 1st D.C.A. 1988). Also, as we consider the issue of preclusive effect of the *Norwood-Norland* litigation, we need to keep in mind the nature of relief sought, i.e., the invalidity of the zoning action and *not* the question of whether the zoning action constituted an uncompensated taking. It is in those contexts that we analyze the specifics of whether and to what extent the *Norwood-Norland* holdings, in and of themselves, preclude the grant of relief sought by appellants in this federal litigation.

Count I – Impairment of Contract Rights

Appellants contend that their contract impairment claim as stated in Count I in this case was not decided in the *Norwood-Norland* litigation because the Florida courts did not determine whether the consents for release of the restrictive covenant were valid and whether the zoning resolution constituted an unconstitutional interference with appellants' contractual rights. That contention may not prevail, since in *Norwood-Norland I* the circuit court considered the Board's resolution and evaluated the substantive legal claims which appellants now again assert, namely, the propriety of the 351-foot setback, the apportionment of votes per parcel rather than per owner, and the rights of Dade County and the State of Florida, as individual owners of parcels, to one vote for each parcel

owned.[9] Because the circuit court did adjudicate those questions, its determinations are entitled to preclusive effect if it had jurisdiction over those issues on appeal from the administrative zoning action.

Under Florida law, "[w]here a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine whether [in the administrative proceeding] procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence. The district court, upon review of the circuit court's judgment, then determines whether the circuit court afforded procedural due process and applied the correct law." *City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 626 (Fla.1982). *See also Norwood-Norland II*, 511 So.2d at 1012.

The purpose of such a restricted scope of review is to guard against the substitution of the judgment of the courts for that of the administrative body in the exercise of the latter's powers, *see Metropolitan Dade County v. Brisker*, 485 So.2d 1349, 1351 (Fla. 3d D.C.A.), *review denied*, 494 So.2d 1151 (Fla.1986); *Dade County v. Yumbo*,

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[9] The circuit court concluded with respect to the 351-foot setback: "It is not controverted . . . that appellees had a right to change the application prior to the rezoning hearing." As to the other contentions, that court wrote that "[t]he construction given by the County in the zoning proceedings should be given great weight," and stated that the appellants failed to meet their burden of showing that the homeowners, and not the developers, were the ultimate intended beneficiaries of the covenant.

348 So.2d 392, 394 (Fla. 3d D.C.A.), *cert. denied*, 354 So.2d 988 (Fla.1977), at least when the administrative action is not arbitrary or discriminatory, and when reasonable minds can differ as to the benefits of the administrative action. Reversal by a Florida court is not warranted simply because, as a reviewing court, it might prefer a different result than that reached by the administrative zoning authority. Nonetheless, Florida law does not call for its courts to rubber-stamp administrative zoning actions, but rather carefully to consider their validity or invalidity. *See, e.g., Gulf Pines Memorial Park v. Oaklawn Memorial*, 361 So.2d 695, 698-99 (Fla.1978).

In accordance with those principles, the circuit court in *Norwood-Norland I* considered whether the release of the covenant was valid and, in so doing, concluded that essential legal requirements had been met and that substantial evidence existed to support the zoning actions. Also, in the *Norwood-Norland* litigation, the circuit and district courts accepted the County Commissioners' construction of the covenant. Thus, appellants are not entitled to consideration by this court on the merits of the validity of the zoning authority's actions with respect to the restrictive covenant and its release.[10] In that light, we

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[10] Appellants contended during oral argument before us that neither the circuit court nor the district court determined in *Norwood-Norland I* or *II* whether the releases were authentic. That is apparently true. However, counsel, during oral argument before us, stated that the circuit court had the boxes of releases before them. Thus, that court could have determined their authenticity if that court had been specifically asked so to

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affirm Judge Spellman's application of res judicata to Count I.[11]

Count II – Substantive Unconstitutionality of the Zoning Resolution

Substantive Due Process

Appellants complain in Count II that the rezoning for the stadium development violated the Dade County Comprehensive Land Use Plan and destroyed appellants' expectation of a residential neighborhood. In so doing, appellants seemingly allege denial of substantive due process based upon violation of the Land Use Plan, and also apparently contend that enforcement of the zoning action without appropriate arrangements with respect to air, light, noise, pollution and parking constitutes a taking of appellants' property without just compensation.

"Where property interests are adversely affected by zoning the courts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns. . . ." *Schad v. Mt. Ephraim*, 452 U.S. 61 68, 101 S.Ct. 2176, 2182, 68 L.Ed.2d 671 (1981). *See*

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do. However, appellants seemingly did not so request. Having not pressed that opportunity in *Norwood-Norland*, appellants cannot so do in this federal litigation.

[11] In the court below, appellants sought partial summary judgment with respect to the claimed violation of the restrictive covenant. That claim may of course not succeed in this case in view of the preclusive effect to which we hold the Florida court's determinations in *Norwood-Norland are entitled.*

Rogin v. Bensalem Township, 616 F.2d 680, 689 (3d Cir.1980), *cert. denied sub nom. Mark-Garner Assoc., Inc. v. Bensalem Township*, 450 U.S. 1029, 101 S.Ct. 1737, 68 L.Ed.2d 223 (1981) ("The test for determining whether a law comports with substantive due process is whether the law is rationally related to a legitimate state interest."). *See also Shelton v. City of College Station*, 780 F.2d 475, 482-83 (5th Cir. en banc), *cert. denied*, 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566 (1986). In *Norwood-Norland I*, the circuit court explicitly noted that construction of a sports stadium was a legitimate public purpose under Florida law, and that it comported with the Land Use Plan. The district court, in review of the circuit court, wrote that "[w]hen . . . the zoning authority has approved a use more *intensive* that that proposed by the plan, the decision must be subject to 'stricter scrutiny' than the 'fairly debatable' standard contemplates. Zoning decisions must not only meet the 'fairly debatable' standard, but they also should be 'consistent' with the comprehensive land use plan." *Norwood-Norland II*, 511 So.2d at 1012 (emphasis in original). Under that "strict scrutiny" standard of review, the district court affirmed the circuit court's determination of the existence of a legitimate public purpose under state law. Thus, because the Florida state courts have addressed appellants' substantive due process concerns, appellants are precluded from relitigating those questions in this federal action.

Taking

That brings us to appellants' taking claim. "Although a zoning ordinance or other law comports with the requirements of substantive due process, it nonetheless

may violate the 'taking' clause of the Fifth Amendment that is applicable to the states through the Fourteenth Amendment. Thus, if an otherwise valid law severely diminishes the value or impairs the use of a parcel of land, the state or local government may be constitutionally obligated to compensate the owner." *Rogin*, 616 F.2d at 690 (footnotes omitted).[12]

In *Albrecht v. State, supra*, certain landowners, after exhausting the state administrative process, unsuccessfully filed a petition against the Department of Environmental Regulation of Florida in a Florida District Court of Appeal challenging the facial validity of a Florida statute under which that Department had denied a dredge and fill permit on the land involved. The Supreme Court of Florida refused to grant certiorari review. The landowners then brought a new suit in a Florida circuit court, alleging an unconstitutional taking without compensation and seeking compensation for inverse condemnation. In the new case, writing for a unanimous court, Justice Adkins noted that "a claim of uncompensated taking constitutes a separate and distinct cause of action from that litigated previously." *Id.* at 12. The first involved a challenge to "the propriety of the agency's actions," while the second related to a claim of taking without compensation. *Id.* Justice Adkins stated that "the standards necessary for exercise of the police power" may be met, but nevertheless may "result in a taking," and that "the propriety of the agency action must be

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[12] *See also Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *Schad*, 452 U.S. at 68, 101 S.Ct. at 2182; *Developments in the Law – Zoning*, 91 Harv.L.Rev. 1427, 1462 (1978).

finally determined before a claim of inverse condemnation exists." *Id.* Justice Adkins concluded that "the doctrine of res judicata [had been] improperly applied" by the circuit court and stated:

> Permitting the petitioners to bring their claim in circuit court does not conflict with out decision in *Key Haven* [427 So.2d 153 (Fla.1982)]. In that case we provided alternative methods of bringing a claim of inverse condemnation once all executive branch review of the action has been completed. Direct review in the district court of the agency action *may* be eliminated and proceedings properly commenced in circuit court *if* the aggrieved party accepts the agency action as proper. *Key Haven,* 427 So.2d at 159. The point is that the propriety of the agency action must be finally determined before a claim for inverse condemnation exists. In *Key Haven* we merely provided an alternative to direct review for those parties who wish to accept the propriety of the action. This was not meant to extinguish the property owner's right to bring the separate claim of inverse condemnation in circuit court at the conclusion of all judicial as well as executive branch appeals regarding propriety of the action. Whether the party agrees to the propriety or it is judicially determined is irrelevant. In either case the matter is closed and a claim of inverse condemnation comes into being. We emphasized that once a party agrees to the propriety of the action and chooses the circuit court forum, it is estopped from any further denial that the action itself was proper. *Id.* at 160. This is not to say that once a party chooses to litigate the propriety of the action through the district court that it is estopped from bringing a claim of inverse condemnation in circuit court.

Id. at 12-13.

In *Dade County v. National Bulk Carriers*, 450 So.2d 213 (Fla.1984), in an opinion filed five months after *Albrecht*, the property owner had been denied a use permit to excavate a lake on its property in order to build, by fill, certain of its land to a higher point of elevation. The zoning commissioner also rezoned the property for preservation purposes. On appeal, the circuit court, in upholding the administrative zoning action, "noted that its opinion should not be construed as a denial of [a landowner's] right to raise the taking issue in a separate action." *Id.* at 215. Writing for the Supreme Court, Justice Adkins remanded, holding that the court below had misconstrued a Florida statute and also because:

> In our recent decisions in *Albrecht v. State, and Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, we recognized the proposition that under certain circumstances a statute or regulation may meet the standards necessary for an exercise of the police powers and authorize a taking. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 [43 S.Ct. 158, 67 L.Ed.322] (1922); *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla.), *cert. denied*, 454 U.S. 1083 [102 S.Ct. 640, 70 L.Ed.2d 618] (1981). In *Albrecht* we held that a claim of uncompensated taking constitutes a separate and distinct cause of action from an action challenging the propriety of an agency's action in denying a permit to dredge and fill. We recognized that the determination, judicially or otherwise, that such an action was authorized under the applicable statute does not necessarily also determine that there is no taking. We distinguished between a zoning change or denial on the one hand and a permit denial on the other hand in *Key Haven*. We explained that "[a] zoning ordinance is, by definition, *invalid if it is*

> *confiscatory*," 427 So.2d at 159, and consequently, no inverse condemnation would be necessary. On the other hand, as in *Key Haven*, if the "statute authorizes a permit denial which is confiscatory," *id.*, a separate condemnation proceeding is an appropriate remedy. Under the type of statutory permitting-scheme involved in *Key Haven*, *Albrecht*, and *Graham v. Estuary*, it was contemplated that its application may result in a taking. Such is not the case in the application of a zoning ordinance. To be valid, it must be reasonable. If a zoning ordinance is confiscatory, the relief available is a judicial determination that the ordinance is unenforceable and must be stricken. We hold that this cause should be remanded to the circuit court for a determination of whether the county's action is confiscatory and constitutes a taking without just compensation, in which event the action of the board must be stricken. A denial of rezoning cannot be both reasonable and confiscatory.

Id. at 215-16 (certain citations omitted).

Our decision in *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir.1987), involved a § 1983 suit for damages for inverse condemnation by Florida zoning action, and required this court to apply *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). In *Williamson*,

> the Supreme Court of the United States held that a Section 1983 claim for money damages stemming from a regulatory taking of property in violation of federal constitutional rights is not ripe for review on the merits until the Plaintiff demonstrates, first, that a final decision by the relevant authority regarding application of the regulation to the subject property has been made, i.e., the "initial decision-maker has

> reached a definitive position on the issue that inflicts an actual, concrete injury," 473 U.S. at 193 [105 S.Ct. at 3120]; and second, that no adequate state remedy, such as inverse condemnation, is available to redress the injury occasioned by the final decision. *Id.* at 196-97 [105 S.Ct. at 3121-22]. The rationale of the Court is that, absent the state's denial to a property owner of just compensation, there can be no cognizable harm to any federal constitutional right. 473 U.S. at 194 n. 13 [105 S.Ct.at 3120 n. 13]. ("The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.").[2]

Corn, 816 F.2d at 1515-16 (certain citations omitted).

In *Corn*, over a period of more than ten years, there were numerous zoning actions and state court decisions affecting the property involved. As in this case, the taking issue had not been decided in any of those proceedings.

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[2] The appellant in *Williamson County* had challenged the zoning ordinance as invalid on two theories: First he argued it violated the Fifth Amendment's Just Compensation Clause, as applied to the states through the Fourteenth Amendment; alternatively, he claimed the regulation was a violation of the Due Process Clause of the Fourteenth Amendment to the Constitution. Because the Court found the action was not ripe for review, it did not reach the merits of the appellant's challenges or decide whether a confiscatory zoning regulation – a "taking" – is more appropriately considered a violation of the Due Process or the Just Compensation Clause. Nevertheless, in holding that the claim was premature under either theory, id. at 199-201 [105 S.Ct. at 3123-3124], the Supreme Court implicitly ruled that the same ripeness test must be applied to both claims.

Accordingly, as did this court in *Corn*, "[w]e note at the outset that there is no issue the first prong of *Williamson County's* ripeness test has been satisfied" and that "[t]he remaining dispute centers on fulfillment of *Williamson County's* second prong: whether, in fact, there exists an available and adequate state remedy to compensate [the landowner] for his loss." *Id.* at 1516. After discussing Florida law as set forth in *National Bulk Carriers, Albrecht* and *Key Haven*, including the absence of an action for inverse condemnation as a remedy when a valid zoning change has occurred and the availability of such an action when a permit denial is involved, this court held in *Corn*:

> In light of the foregoing, we conclude that Florida does not avail a property owner an action to recover just compensation through inverse condemnation for injuries sustained as a result of an unreasonable zoning ordinance later declared invalid. We further find no support for the availability of an action for money damages, based either on trespass or violation of the right of due process, as guaranteed by the Florida Constitution.[8] As discussed above, the cited authorities are persuasive that the remedy of invalidation is an exclusive one pursuant to Florida law, because zoning is a function of the police power rather than the exercise of eminent domain.

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[8] Article 1, Section 9 of the Florida Constitution provides that "No person shall be deprived of life, liberty or property without due process of law. . . ."

Id. at 1519.

While it is difficult, as it was in *Corn*, to classify the contentions in Count II of the complaint in this case as growing totally out of alleged invalidity of a zoning ordinance rather than something more akin to denial of a permit, on balance, it would appear that we are dealing with more of the former than the latter. Accordingly, we hold that the second prong of *Williamson County* has been satisfied and that appellants, on remand, may pursue under 42 U.S.C. § 1983, their taking claim in this case.

That claim requires determination of whether or not appellants have suffered sufficient diminution of their property rights from the occurrences of which they complain in this case, so as to entitle them to any compensation. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978); *Developments in the Law – Zoning*, 91 Harv.L.Rev. 1427 (1978).[13]

Count III – Alleged Pattern of Discrimination

In their third count, the individual appellants, who are black residents of the Lake Lucerne area, claim a history of unconstitutional and discriminatory community development by appellee Dade County, and a conspiracy among the County and appellees South Florida Regional Planning Council, Dolphin Stadium Corporation, Joe Robbie, and Morton Properties to further the interests of the developers of the Dolphin Stadium project while ignoring the property rights of appellants. The

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[13] Whether or not, after appropriate discovery opportunity is afforded to the parties, there will remain any triable fact issue with regard to the taking claim will be up to the district court, on remand, to determine.

district court abstained from exercising federal jurisdiction over the claims of appellants, brought pursuant to 42 U.S.C. § 1983, *et al.*, in Count III because of the pending state action, which contained a similar count. In so doing, the district court applied the abstention standards stated by the Supreme Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 14-16, 103 S.Ct. 927, 936-37, 74 L.ed.2d 765 (1983). Appellees rely upon those determinations by Judge Spellman and also contend that appellants' Count III contentions are barred by principles of preclusion. The latter argument may not prevail since appellants' Count III civil right claims represent different allegations than the attacks in *Rolling Oaks I* and *II* and in *Norwood-Norland I* and *II*. In addition, while there was some discussion of racial discrimination during the zoning hearing, there was not, as discussed *supra*, full and fair opportunity for litigation of that issue at that time.

However, for reasons unrelated to preclusion, the district court abstained from deciding and dismissed Count III because of the pending Lake Lucerne state action. Relying upon the factors articulated by the Supreme Court in *Moses H. Cone*, Judge Spellman concluded that a Florida state court would be the most efficient and appropriate forum for resolution of the civil rights claims.

In *Noonan South, Inc. v. The County of Volusia*, 841 F.2d 380 (11th Cir.1988), Judge Vance, writing for this court, wrote that in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), the Supreme Court had "suggested" that when there is a pending "parallel state court action, . . . federal

courts [should] consider a number of factors in determining the appropriateness of dismissal: (1) whether one of the courts has assumed jurisdiction over property; (2) the inconvenience of the federal forum; (3) the potential for piecemeal litigation; . . . (4) the order in which the forums obtained jurisdiction"; and that in *Moses H. Cone,* the Supreme Court had "mentioned two additional factors: (5) whether federal or state law will be applied; and (6) the adequacy of each forum to protect the parties' rights." *Noonan South,* 841 F.2d at 381. Our application of those factors leads us to disagree with the district court's dismissal of Count III on abstention grounds.

Jurisdiction over property is not implicated in either the stayed state or the instant federal action, and each forum would appear equally convenient for the parties. As to the potential for piecemeal litigation, counsel for appellants, during oral argument before us, specifically stated their desire to move ahead in this federal case and have continued the existing stay in the state action. Accordingly, there is little or no potential for duplicative or simultaneous litigation of the issues raised in Count III in state and federal forums.

Emphasis upon the order in which the forums obtained jurisdiction "does not turn on which complaint was filed first. Instead, it is measured 'in terms of how much progress has been made in the two action.' " *Noonan South,* 841 F.2d at 382, *quoting Moses H. Cone,* 460 U.S. at 21, 103 S.Ct. at 940. In the instant case, the record indicates that there has been little activity in the state court case and that there will be little or none prior to resolution of the issues being remanded to the federal district court pursuant to this opinion.

As for the final two factors added by the Supreme Court in *Moses H. Cone*, whether the civil rights issues raised in Count III are determined in state or federal court, federal law will govern their adjudication. While, like the district court, we are convinced that "[t]here is absolutely no reason why the courts of the state of Florida are any less competent than [a federal] court to adjudicate the civil rights claim at issue,"[14] the sixth "factor will only weigh in favor or against dismissal when one of the forums is *inadequate* to protect a party's rights." *Noonan South*, 841 F.2d at 383.

In short, since "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule," *Colorado River*, 424 U.S. at 813, 96 S.Ct. at 1244, since "the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention," *Noonan South*, 841 F.2d at 381, *quoting Colorado River*, 424 U.S. at 818, 96 S.Ct. at 1246, and since appellants have indicated by their actions their desire to pursue their federal civil rights claim in federal court only, we reverse the district court's dismissal of Count III and remand appellants' contentions in Count III, as well as appellants' taking claim in Count II, for further appropriate proceedings in the federal district court.[15]

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[14] Judge Spellman's opinion at p. 5.

[15] After oral argument, some of appellees filed a Motion to Dismiss Because of Lack of Subject Matter Jurisdiction. Appellants responded with a Motion to Strike and Motion for

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AFFIRMED in part; REVERSED in part; and REMANDED for further proceedings consistent with this opinion.[16]

(Continued from previous page)

Sanctions. Both motions are denied. In this appeal, review is not sought of state court judgments; rather, appellants seek reversal, *inter alia*, of the district court's application of preclusion principles. Appellees' argument is misplaced. However, we do not find it to be frivolous. *See Hollins v. Wessel*, 819 F.2d 1073, 1074 (11th Cir.1987).

[16] On remand, the district courts' assessment of costs upon appellants should be considered anew.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

Case No.: 87-1546-Civ-SPELLMAN

LAKE LUCERNE CIVIC ASSN., INC., et al.,

Plaintiffs,

DOLPHIN STADIUM CORPORATION, et al.,

Defendants.

_____/

JUDGMENT
(Filed April 7, 1988)

THIS CAUSE having come before the Court upon the the Defendants' Motions to Dismiss and for Summary Judgment, and the Court having considered said Motions, including the extensive transcripts generated and opinions rendered by the Courts of the State of Florida pertaining to the matters raised in said Motions, and a decision on said Motions having been duly rendered by this Court on March 22, 1988, it is thereupon

ORDERED AND ADJUDGED that:

1. The Defendants' Motions are granted.

2. Counts I and II of Plaintiffs' Complaint are dismissed with prejudice and Count III of Plaintiffs' Complaint is dismissed with prejudice from the United States District Courts, but without prejudice to further State Court proceedings.

3. Plaintiffs shall take nothing by this suit and Defendants shall go hence without day.

4. Defendants shall recover their costs of this action from Plaintiffs which sum shall be determined upon subsequent Motion of Defendants.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 7 day of April, 1988.

/s/ Eugene P. Spellman
United States District Court Judge

Copies furnished to:
All counsel of record

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF
FLORIDA

CASE NO. 87-1546-CIV-
SPELLMAN

LAKE LUCERNE CIVIC ASS'N
INC., et al.,
Plaintiffs,

-vs-

DOLPHIN STADIUM CORP.,
etc., et al.,
Defendant.
_____/

ORDER GRANTING FINAL SUMMARY JUDGMENT FOR DEFENDANTS AS TO COUNTS I AND II OF THE COMPLAINT AND DISMISSING COUNT III UNDER PRINCIPLES OF ABSTENTION
(Filed March 22, 1988)

THIS CAUSE comes before the Court upon Defendants' Motions to Dismiss and for Summary Judgment. The Court has carefully reviewed the record, and the exhibits filed with these Motions, including extensive transcripts and opinions issued by the courts of the state of Florida pertaining to these matters.

The Court will refrain from recounting in detail the background of this case which apparently has been adequately recounted by numerous courts that have considered the matters herein raised. In brief, the Plaintiffs have filed a three count complaint with this Court. Count I alleges "Unconstitutional Impairment of Contract

Rights." Count II alleges "Substantive Unconstitutionality of Zoning Resolution." Finally, Count III alleges "Violation of Civil Rights." The Defendants challenge the Complaint on a number of bases, the most obviously meritorious of which is res judicata and collateral estoppel.

These doctrines of finality developed for the very sound policy reason that litigation should ultimately come to a final stop. The facts before this case clearly demonstrate the utility of the policy of finality. The Dade County zoning board rendered a decision against the Plaintiffs in this action approving of the construction of a sports complex near the Plaintiffs' homes despite their assertion that such construction was impermissible by virtue of restrictive covenants within the deeds pertaining to the area. Subsequently, the Plaintiffs appealed the decision of the administrative tribunal to the courts of the State of Florida.

In Count I of the Complaint, the Plaintiffs claim that the Defendants, by allegedly "invalidating" the restrictive covenant that would have prohibited the Defendants from constructing the stadium in the Plaintiffs' community, effected an "unlawful impairment of private contract rights in violation of Article I, Section 10 of the United States Constitution." The Plaintiffs "allege specifically that the issues raised in counts I and II have not been previously decided." Plaintiffs Response to Dolphin Stadium Corporation's Motion to Dismiss of September 4, 1987, at 4. The Court, however, clearly finds this representation to have been incorrect.

First, under the doctrine of res judicata, the Plaintiffs should have brought all claims arising out of the same core of facts in the first proceeding. Thus, when the Plaintiffs challenged the substantive accuracy of the Defendants' construction of the covenant, the Plaintiffs' could have and should have challenged its constitutionality as well, assuming that it did not do so. To not have done so clearly falls within the rubric of "claim splitting." *See E.B. Elliott Advertising Co. v. Metropolitan Dade County*, 425 F.2d 1141 (5th Cir. 1970). The Plaintiffs have attempted to recast the same facts and claims that have been decided by the trial and appellate courts of this state as Constitutional claims. *See Hollins v. Wessel*, 819 F.2d 1073 (11th Cir. 1987).

Moreover, under the doctrine of collateral estoppel, it appears that the constitutional issue was raised. In the Plaintiff's Amended Petition for Writ of Certiorari, the Plaintiffs presented the issue as follows: "In deleting the restrictive covenant, at the request of a private party to the contract, solely by a zoning resolution, DADE COUNTY unreasonably impaired Petitioners' contractual rights by a legislative act in violation of Article I, Section 10 of the Florida and Federal Constitutions." Thus, it appears that either the Plaintiffs raised the constitutional issue and that it was decided, or that they should have raised it. *See Albrecht v. State*, 444 So. 2d 8 (Fla. 1984).

Assuming arguendo that the constitutional issue was not decided in state court, collateral estoppel still applies. The state courts held, and on appeal affirmed, that the terms of the restrictive covenant had not been violated by the release of the covenant. Thus, no contractual right has been impaired. Therefore, there is no basis for an analysis

of unconstitutional impairment and Count I of the Complaint is barred under the doctrines of res judicata, collateral estoppel, or both.

The second count of the complaint is similarly barred. The Plaintiffs allege in this Count that the zoning resolution was substantively unconstitutional. In their Amended Petition for Writ of Certiorari, their Reply Brief and their subsequent Motion for Rehearing, which has been denied, the Plaintiff argue, *inter alia*, that "[z]oning is arbitrary and unreasonable by legislative standards where the impacts of a proposed commercial development would alter the character of adjacent residential communities, presents a threat to the health, safety and welfare of its inhabitants, and otherwise is not needed in the location." The same analysis applies here. The Plaintiffs either litigated the constitutionality of the zoning resolution in the state court or it could have and should have done so.

Moreover, the Appellate Division of the Eleventh Judicial Circuit Court found that there was a reasonable relationship between the police power of the state and the resolution and that the zoning at issue was not "fairly debatable." On May 20, 1987, the Third District court of Appeals, *per curiam*, denied the Plaintiff's Petition for Certiorari upheld "the Dade County Circuit Court's affirmance of the zoning resolution rezoning the affected property . . . "

The Court is of the opinion that the claim which the Plaintiffs seek to litigate in this case are substantially identical to that litigated in state court and affirmed by

the Third District Court of Appeals. Therefore, the Plaintiffs are collaterally estopped from relitigating this issue before this Court. Moreover, assuming that the claim in any way differs from that previously litigated, the facts out of which it arises are substantially identical. Therefore, the second count of the complaint amounts to claim splitting, and thus is also precluded by the doctrine of res judicata.

As to the third Count of the Complaint, the Court is of the opinion that it should abstain from exercising its jurisdiction on this issue. Dismissal under the abstention doctrine is appropriate in this case on "considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 14-15 (1983) (quoting *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976)). As the Supreme Court noted in *Moses H. Cone Hospital*, several factors need to be considered by a Federal District Court in determining the propriety of abstaining from hearing a federal claim that is simultaneously pending in state court: the inconvenience of the federal forum; the desirability of avoiding piecemeal litigation; the order in which jurisdiction was obtained by the concurrent forums; the presence in the suit of extensive rights governed by state law; and the litigant's previous willingness to litigate similar suits in state court. A careful consideration of these factors clearly demonstrates the propriety of abstention in this case. *Id.*

If this Court were to consider the Plaintiffs' civil rights claim at this stage, it would result in piecemeal

litigation. There is absolutely no reason why the courts of the state of Florida are any less competent than this Court to adjudicate the civil rights claim at issue. The state courts have adjudicated nearly all of the issues that have arisen out of the same key set of facts out of which this civil rights claim purportedly arose. It would be a gross waste of this Court's judicial resources to consider the merits of this case as profoundly as would be necessary to resolve this matter, when the state court has been adjudicating the relevant issues in this case for nearly four years.

Significantly, the Plaintiffs' civil rights claim in state court is virtually identical with that filed before this Court. Moreover, the state court claim was filed approximately fourteen months before the claim was filed in this Court. It would be extremely unwise for the Court to consider the propriety of abstention only in light of the pendancy in state court of the civil rights claim. The state court action as a whole has been proceeding for four years and, has reached the appellate level of the state court system.

This was not a case in which two adversaries both brought simultaneous actions arising out of the same facts in different fora as was the case in *Moses H. Cone Hospital;* rather, it involves the same Plaintiffs who have brought the same action twice in two different fora. Such action clearly raises a very strong inference of forum shopping, particularly inasmuch as the states court's previous adjudications had not proved very favorable to the Plaintiffs. Up until this point in time, the Plaintiffs have been extremely willing to pursue relief in the state court. The Plaintiffs have not substantiated that the state court

proceedings were less than fair. Therefore, the simultaneous adjudication by this Court of the Plaintiffs' civil rights claim would constitute an unjustifiable and gross misuse of federal judicial resources.

Finally, the resolution of the civil rights claims at issue could force the adjudicating court to draw heavily on present and past zoning practices of Dade County and several other matters of a uniquely local nature. It would be more appropriate for the state court to resolve these matters. Thus, for the foregoing reasons, this Court abstains from exercising jurisdiction as to the Plaintiffs' civil rights claim. *See Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838 (9th Cir. 1979); *East Naples Water Systems, Inc. v. Board of County Commissioners of Collier County*, 627 F. Supp. 1065 (S.D. Fla. 1986). Accordingly, it is hereby

ORDERED AND ADJUDGED that the Defendants' Motions for Summary Judgment are **GRANTED** as to Counts I and II of the Complaint. As to the final count of the Complaint, the Court hereby ABSTAINS from exercising jurisdiction as to this claim; accordingly, the Defendants' Motion to Dismiss this Count of the Complaint is **GRANTED**. It is further ORDERED that the Plaintiffs' pending Motions for summary judgment and for preliminary injunctive relief are hereby rendered MOOT.

DONE AND ORDERED in Chambers at Miami, Florida this 22 day of March, 1988.

/s/ Eugene P. Spellman
UNITED STATES DISTRICT JUDGE

cc: all counsel of record

NORWOOD-NORLAND HOMEOWNERS' ASSN., INC., Lake Lucerne Civic Assn., Inc., Crestview Homeowners' Assn., Inc., Rolling Oaks Homeowners' Assn., Inc., Mildred Harris, Barry Young, Elbert Waters, Betty Ferguson and Leon Bland, Petitioners,

v.

DADE COUNTY, Dolphin Stadium Corporation, Inc., Emil Morton, Lawrence Morton, Lottie Morton d/b/a Morton Properties, Respondents.

No. 86-2309.

District Court of Appeal of Florida,
Third District

May 20, 1987.

Rehearing and Certification Denied
Sept. 21, 1987.

Certiorari was sought to review order of the Circuit Court, Dade County, Allen Kornblum, Michael H. Salmon and Steven D. Robinson, JJ., which upheld zoning amendment for construction of proposed professional football stadium. The District Court of Appeal held that: (1) determination that proposal was consistent with master plan was supported by the record, and (2) purported release of restrictive covenant on a portion of the property was affected.

Petition denied.

George F. Knox of Long & Knox and H.T. Smith, Miami, for petitioners.

Robert A. Ginsburg, Dade Co. Atty., and Robert L. Krawcheck, Asst. Co. Atty., Miami, for respondent-Dade County.

Robert L. Shevin and Brian S. Dervishi of Sparber, Shevin, Shapo, Heilbronner & Book, P.A., Miami, for respondent-Dolphin Stadium Corp.

Stephen H. Reisman and Donald S. Rosenberg of Rosenberg Reisman & Glass, Miami, for respondent-Morton Properties.

PER CURIAM.

This petition for writ of certiorari, as amended, is the second challenge brought to this court by homeowners' associations and individual property owners contesting the construction of the proposed Dolphin Stadium and adjoining complex involving approximately 432 acres in northwestern Dade County. We deny the petition and uphold the Dade County Circuit Court's affirmance of the zoning resolution rezoning the affected property and releasing a part of it from a restrictive covenant.

Petitioners' first appeal was from an order dismissing their third amended complaint in a multi-count action in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, which this court affirmed in part and reversed and remanded on certain counts. *Rolling Oaks Homeowners' Association v. Dade County*, 492 So.2d 686 (Fla. 3d DCA 1986). In this second challenge, petitioners seek review by certiorari of a three-judge panel decision by the Circuit Court in and for Dade County, rendered in its appellate capacity, which affirmed the Dade County Commission's approval of zoning resolution Z-211-85, rezoning the property known as the Lake Lucerne site for the proposed Dolphin Stadium Complex.

The zoning resolution adopted by the Dade County Commission implemented certain zoning changes including an "unusual use" zoning designation for the stadium, and cancelled a restrictive covenant governing density limits on development of one portion of the Lake Lucerne site. The restrictive covenant, which governed only one portion of the land, owned by Emil Morton, Lottie Morton and Lawrence Morton, individually and as trustees d/b/a Morton Properties (the Mortons), was contained in a document entitled "Covenant Governing Land Development," entered into between the Mortons and the developer and Metropolitan Dade County, dated February 16, 1977. The parties agreed to certain lower density uses of the subject property, including use as a park, for a school, etc. The parties further agreed to the following conditions for modification or release of the covenant's restrictions on use:

Modification; Release:

> This Agreement may be modified, amended, or released as to any portion of the land described herein by a written instrument executed by the then-owner of the fee-simple title to the lands to be affected by such modification, amendment or release, along with a majority of the property owners within 350 ft. of the property for which such modification is proposed, as well as along with a majority of the property within 350 ft. of the property shown in the Plan, and approved after public hearing by Resolution of the Board of County Commissioners or Zoning Appeals Board of Metropolitan Dade County, Florida, whichever by law has jurisdiction over such subject matter.

Under Metropolitan Dade County's Comprehensive Development Master Plan for Land Use, (Master Plan), the site of the proposed development is designated low density or low-medium density residential use. However, a portion of the property is designated as a Sub-Metropolitan Activity Center under the Master Plan. The Master Plan describes activity centers as follows:

> **Activity Centers**
>
> Diversified activity centers will become the main hubs for future urban deveolopment [sic] in Dade County, resulting in a more compact and efficient urban structure. These desig-nunified complexes will house commercial facilities, offices, high-rise apartments, and public facilities such as hospitals and educational institutions. Metropolitan mass transit service should be provided directly to the centers, as should direct connections to a nearby expressway or principal arterial to ensure a high level of countywide accessibility. They would contain a concentration of different urban functions integrated both horizontally and vertically. These centers would be characterized by physical cohesiveness and an intensive usage of land.
>
> The Plan map indicates both emerging and proposed activity centers. New centers are proposed in areas having the following qualities: good countywide accessibility by both roadways and mass transit; compatibility with future surrounding development; and programmed provision of public services. Special emphasis should be given to providing rapid transit service to the greatest number of metropolitan and regional centers.

In March, 1985, Dolphin Stadium Corporation submitted a zoning application to rezone the entire 432 acre site. This application was amended and a second application was submitted to the Dade County Building and Zoning Department in April, 1985. Dolphin Stadium Corporation requested approval for a development of regional impact, (DRI), particularly a recreation/office/retail/hotel complex. It also requested district boundary changes from townhouse classifications to office park district, motel/hotel, "unusual use" designation to permit the stadium itself, a helicopter landing pad, and deletion of the Covenant governing Land Development recited earlier. After a seven-hour public hearing, the Metropolitan Dade County Commission passed Resolution Z-211-85 and an accompanying development order approving the DRI.

Petitioners filed an appeal to the Dade Circuit Court from the County Commission's decision, which resulted in affirmance by the majority of a three-judge panel, with a dissenting opinion by Judge Steven D. Robinson. The majority concluded that petitioners had failed to show that rezoning the Lake Lucerne property for construction of a sports stadium complex constituted a deviation from the Master Plan, and further concluded that the restrictive covenant governing the Morton property had been properly released. The court also determined that the zoning resolution adopted by the County Commission was "fairly debatable," and should be upheld. Judge Robinson dissented only on the issue of release of the restrictive covenant. He cited the covenant's requirement of a vote of consent for its release by "a majority of property owners," and disagreed with the County Commission's interpretation of that term to allow one lot owner of a

subdivision to obtain a separate vote for each lot owned. Petitioners now seek relief from the circuit court's affirmance of the zoning resolution by petition for writ of certiorari.

STANDARDS OF REVIEW OF ZONING CHALLENGE

The standard of review for circuit courts *directly* reviewing agency or municipal zoning cases is by now well established. The circuit court is charged with determining whether the agency or municipality accorded procedural due process rights, observed the essential requirements of law, and supported its findings with substantial, competent evidence. It is axiomatic that "zoning or rezoning is the function of the appropriate zoning authority and not the courts. . . ." *Skaggs-Albertson's v. ABC Liquors, Inc.*, 363 So.2d 1082, 1091 (Fla.1978). Reviewing courts are not empowered to act as super zoning boards, substituting their judgment for that of the legislative and administrative bodies exercising legitimate objectives. *S.A. Healy Company v. Town of Highland Beach*, 355 So.2d 813 (Fla. 4th DCA 1978). Instead, the scope of review is one which recognizes a zoning authority's power to impose reasonable regulations in furtherance of health, safety and community welfare, and to determine, on the evidence before the court, whether the local authority's zoning decision is "fairly debatable." The "fairly debatable" test asks whether reasonable minds could differ as to the outcome of a hearing. If so, the court should sustain a county commission's resolution. *Dade County v. United Resources, Inc.*, 374 So.2d 1046 (Fla. 3d DCA 1979); *Davis v. Sails*, 318 So.2d 214 (Fla. 1st DCA

1975); *City of Miami v. Schutte*, 262 So.2d 14 (Fla. 3d DCA 1972).

The scope of *this* court's review of a circuit court order rendered in its appellate capacity in an administrative action is even narrower. As pronounced in *City of Deerfield Beach v. Vaillant*, 419 So.2d 624 (Fla. 1982), this court's review is limited to determining whether procedural due process was afforded, and whether the correct law was applied. *Tomeu v. Palm Beach County*, 430 So.2d 601 (Fla. 4th DCA 1983). Petitioners are *not* entitled to a second or third full appeal in this court. *Metro Dade County Fair v. Sunrise Village*, 485 So.2d 865 (Fla. 3d DCA 1986).

However, as noted recently in *Southwest Ranches Homeowners Association v. County of Broward*, 502 So.2d 931 (Fla. 4th DCA 1987), the standards do not necessarily end here. When, as appears in this case, the zoning authority has approved a use more *intensive* than that proposed by the plan, the decision must be subject to "stricter scrutiny" than the "fairly debatable" standard contemplates. Zoning decisions must not only meet the "fairly debatable" standard, but they also should be "consistent" with the comprehensive land use plan. *Southwest Ranches, supra*, at 939-40.

The statutory definition of "consistency" is contained in section 163.3194(3), Florida Statutes, as recently amended, which provides:

> (3)(a) A development order or land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development

> permitted by such order or regulation *are compatible with* and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.
>
> (b) A development approved or undertaken by a local government shall be consistent with the comprehensive plan if the land uses, densities or intensities, capacity or size, timing, and other aspects of the development are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government. [Emphasis added.]

Sections 163.3194(4)(a)-(b) of the Local Government Comprehensive Planning and Land Development Regulation Act provide a broad range of factors for determining consistency with a comprehensive plan:

> (4)(a) A court, in reviewing local government action or development regulations under this act, may consider, among other things, the reasonableness of the comprehensive plan, or element or elements thereof, relating to the issue justiciably raised or the appropriateness and completeness of the comprehensive plan, or element or elements thereof, in relation to the governmental action or development regulation under consideration. The court may consider the relationship of the comprehensive plan, or element or elements thereof, to the governmental action taken or the development regulation involved in litigation, but private property shall not be taken without due process of law and the payment of just compensation.
>
> (b) It is the intent of this act that the comprehensive plan set general guidelines and principles concerning its purposes and contents and

that this act shall be construed broadly to accomplish its stated purposes and objectives.

ZONING AND THE LAND USE PLAN

Petitioners' first argument is that the development order and zoning resolution approved by the Dade County Commission violated the Master Plan, and that the circuit court therefore departed from the essential requirements of law in affirming the Commission's decision to allow the rezoning. However, our review of the record supports the contrary conclusion. As the circuit court observed, the Master Plan designates some or all of the Lake Lucerne site as a Sub-Metropolitan Activities Center, which sanctions uses such as shopping centers, general business districts, office parks, government centers, cultural and/or recreational complexes. Also, the record contains a Dade County Development Impact Committee report that the proposed Dolphin Stadium complex and related commercial development is compatible and in keeping with the Master Plan, and in basic context with its goals and policies. Given the Master Plan's own use designations, and evidence of the stadium's compatibility, we conclude that petitioners have failed to show how the circuit court departed from or misapplied the law in finding that rezoning for the stadium and retail/hotel/office complex was not a deviation from the Master Plan. Neither do we find any denial of petitioners' procedural due process rights in any of the proceedings leading up to the County Commission's adoption of the zoning resolution.

TERMINATION OF THE RESTRICTIVE COVENANT

Petitioners' second argument is that the circuit court erred in upholding the Commission's adoption of the zoning resolution, which impliedly recognized the effective release of the restrictive covenant on a portion of the property. In exchange for dedicating the land for a park or public purposes and granting Dade County School Board an option on another parcel, the owners and developer agreed to low and medium density housing, parks and schools. The covenant allowed the owners to apply for zoning changes, but provided that before its modification, amendment or release, "a majority of the property owners within 350 feet of the property for which such modification is proposed" would have to consent, as well as "a majority of the property within 350 feet of the property shown in the [development] Plan."

Apparently, respondents were unable to garner the necessary consents due to resistance from area homeowners. The respondents thereupon amended their initial rezoning application to reduce the area involved, creating a 351 foot set back from the border of the Rolling Oaks and Crestview developments, in an effort to eliminate the property owners of that area as owners required to consent to the release of the restrictive covenant. Respondents obtained consents from property owners within a distance of 350 feet from the reduced area. Also, they presented consents from what they tabulated as a simple majority of the acres surrounding the entire development. The County assigned one vote for each parcel owned, so that several of the owners who owned more than one parcel had more than one vote.

Petitioners challenged on appeal in the circuit court, and in this proceeding, the deliberate reduction of the affected property in the rezoning application, arguing that it was gerrymandering in violation of the intent of the restrictive covenant. However, notwithstanding the respondents' obvious intentions behind the amendment of their rezoning application, drawing the lines in by 351 feet to obtain a majority vote, respondents' actions were in full compliance with the restrictive covenant. Respondents had every right to amend their rezoning application to meet the voting requirements for release of the covenant. Petitioners have not shown a misapplication of the law in the circuit court's affirmance of this point.

Petitioners also challenge the manner in which the number of owners was calculated in tabulating a vote of a majority of the affected property owners. They argue that the County Commission erred in construing the restrictive covenant to allow affected property owners to vote one time for each separate parcel owned. Instead, petitioners interpret the covenant to require a majority of affected property owners without regard to the number of separate parcels owned by each. In upholding the commission, the circuit court gave weight to the county's interpretation, and found that petitioners had failed to meet their burden of showing that the county's construction was clearly erroneous.

It is settled by Florida case law that covenants are strictly construed in favor of the free and unrestricted use of property. Where the terms of a covenant are unambiguous, the courts will enforce such restrictions according to the intent of the parties as expressed by the clear and ordinary meaning of its terms. A covenant which is

substantially ambiguous is resolved against the party claiming the right to enforce the restriction. *Moore v. Stevens*, 90 Fla. 879, 106 So. 901 (1925); *Snider v. Grodetz*, 442 So.2d 344 (Fla. 5th DCA 1983); *Barrett v. Leiher*, 355 So.2d 222 (Fla. 2d DCA 1978).

In this case, the provisions for release of the restrictive covenant are susceptible to different interpretations. There was no evidence in the record as to the parties' intentions in drafting the covenant, or compelling the interpretation urged by petitioners as opposed to respondents' construction, allowing an owner to vote once for every lot owned. Indeed, the circuit court observed that it is likely that the developers who were parties to the covenant fully intended to retain majority control over the land until subdivided and sold. One vote per lot owned would be consistent with that intention. Since the respondents' interpretation of the covenant to allow one vote for each lot owned is consistent with the pronounced policy against land restrictions, and is supported by the record, we will not disturb the circuit court's decision to uphold the Commission's finding of a majority vote authorizing release of the covenant.

Finally, petitioners argue that the circuit court departed from the law in striking several of their exhibits in their appendix on direct appeal. The circuit court's examination of the record revealed that the disputed exhibits were not made part of the record below and were not properly before the court on appeal. Our review of the portions of record provided to us by the parties supports the circuit court's order striking the exhibits.

Accordingly, the amended petition for writ of certiorari is denied.

DOWNEY, JAMES C., DELL, JOHN W., and WALDEN, JAMES H., Associate Judges, concur.

FLORIDA DECISIONS WITHOUT PUBLISHED OPINIONS Fla. 585

SUPREME COURT – Continued

Title	Docket Number	*Date	Disposition	**Appeal from and Citation
Norwood-Norland Home-owners' Ass'n v. Dade County	71297	2/10/88	Rev. den.	3d DCA 511 So.2d 1009

*Date of decision or date rehearing denied (if requested).

**Court or agency rendering decision appealed and citation (if reported).

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-5383

D.C. Docket No. 87-1546

LAKE LUCERNE CIVIC ASSOCIATION, INC., et al.,

Plaintiffs-Appellants,

versus

DOLPHIN STADIUM CORP., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

---

Before RONEY, Chief Judge, VANCE, Circuit Judge, and KAUFMAN*, Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED in part and REVERSED in part; and

that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that each party bear their own costs on appeal.

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* Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

Entered: August 3, 1989
For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: OCT 13 1989

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

(Filed October 4, 1989)

NO. 88-5383

LAKE LUCERNE CIVIC
ASSOCIATION, INC., et al.,

Plaintiffs-Appellants,

versus

DOLPHIN STADIUM CORP., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC

(Opinion August 3, 1989, 11 Cir., 198____, ___ F. 2d ___).
( )

Before RONEY, Chief Judge, VANCE, Circuit Judge, and KAUFMAN*, Senior District Judge.

* Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Paul H. Roney
United States Circuit Judge

ORD-42

CONSTITUTION OF THE UNITED STATES

ARTICLE IV.

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 U.S.C. § 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

CONSTITUTION OF THE STATE OF FLORIDA

Article VIII

SECTION 6. Schedule to Article VIII.–

(a) This article shall replace all of Article VIII of the Constitution of 1885, as amended, except those sections expressly retained and made a part of this article by reference.

(b) COUNTIES; COUNTY SEATS; MUNICIPALITIES; DISTRICTS. The status of the following items as they exist on the date this article becomes effective is recognized and shall be continued until changed in accordance with the law: the counties of the state; their status with respect to the legality of the sale of intoxicating liquors, wines and beers; the method of selection of county officers; the performance of municipal functions by county officers; the county seats; and the municipalities and special districts of the state, their powers, jurisdiction and government.

(c) OFFICERS TO CONTINUE IN OFFICE. Every person holding office when this article becomes effective shall continue in office for the remainder of the term if that office is not abolished. If the office is abolished the incumbent shall be paid adequate compensation, to be fixed by law, for the loss of emoluments for the remainder of the term.

(d) ORDINANCES. Local laws relating only to unincorporated areas of a county on the effective date of this article may be amended or repealed by county ordinance.

(e) CONSOLIDATION AND HOME RULE. Article VIII, Sections [1]9, [2]10, [3]11 and [4]24, of the Constitution of 1885, as amended, shall remain in full force and effect as to each county affected, as if this article had not been adopted, until that county shall expressly adopt a charter or home rule plan pursuant to this article. All provisions of the Metropolitan Dade County Home Rule Charter, heretofore or hereafter adopted by the electors of Dade County pursuant to [3]Article VIII, Section 11, of the Constitution of 1885, as amended, shall be valid, and any amendments to such charter shall be valid; provided that the said provisions of such charter and the said amendments thereto are authorized under said [3]Article VIII, Section 11, of the Constitution of 1885, as amended.

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[3] **Note.** – Section 11 of Art. VIII of the Constitution of 1885, as amended, reads as follows:

SECTION 11. Dade County, home rule charter. – (1) The electors of Dade County, Florida, are granted power to adopt, revise, and amend from time to time a home rule charter of government for Dade County, Florida, under which the Board of County Commissioners of Dade County shall be the governing body. This charter:

(a) Shall fix the boundaries of each county commission district provide a method for changing them from time to time, and fix the number, terms and compensation of the commissioners, and their method of election.

(b) May grant full power and authority to the Board of County Commissioners of Dade County to pass ordinances relating to the affairs, property and government of Dade County and provide suitable penalties for the violation thereof; to levy and collect such taxes as may be authorized by general

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(f) DADE COUNTY; POWERS CONFERRED UPON MUNICIPALITIES. To the extent not inconsistent with the

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law and no other taxes, and to do everything necessary to carry on a central metropolitan government in Dade County.

(c) May change the boundaries of, merge, consolidate, and abolish and may provide a method for changing the boundaries of, merging, consolidating and abolishing from time to time all municipal corporations, county or district governments, special taxing districts, authorities, boards, or other governmental units whose jurisdiction lies wholly within Dade County, whether such governmental units are created by the Constitution or the Legislature or otherwise, except the Dade County Board of County Commissioners as it may be provided for from time to time by this home rule charter and the Board of Public Instruction of Dade County.

(d) May provide a method by which any and all of the functions or powers of any municipal corporation or other governmental unit in Dade County may be transferred to the Board of County Commissioners of Dade County.

(e) May provide a method for establishing new municipal corporations, special taxing districts, and other governmental units in Dade County from time to time and provide for their government and prescribe their jurisdiction and powers.

(f) May abolish and may provide a method for abolishing from time to time all offices provided for by Article VIII, Section 6, of the Constitution or by the Legislature, except the Superintendent of Public ins..uction and may provide for the consolidation and transfer of the functions of such offices, provided, however, that there shall be no power to abolish or impair the jurisdiction of the Circuit Court or to abolish any other court provided for by this Constitution or by general law, or the judges or clerks thereof although such charter may create new courts and judges and clerks thereof with

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powers of existing municipalities or general law, the Metropolitan Government of Dade County may exercise all

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jurisdiction to try all offenses against ordinances passed by the Board of County Commissioners of Dade County and none of the other courts provided for by this Constitution or by general law shall have original jurisdiction to try such offenses, although the charter may confer appellate jurisdiction on such courts, and provided further that if said home rule charter shall abolish any county office or offices as authorized herein, that said charter shall contain adequate provision for the carrying on of all functions of said office or offices as are now or may hereafter be prescribed by general law.

(g) Shall provide a method by which each municipal corporation in Dade County shall have the power to make, amend or repeal its own charter. Upon adoption of this home rule charter by the electors this method shall be exclusive and the Legislature shall have no power to amend or repeal the charter of any municipal corporation in Dade County.

(h) May change the name of Dade County.

(i) Shall provide a method for the recall of any commissioner and a method for initiative and referendum, including the initiation of and referendum on ordinances and the amendment or revision of the home rule charter, provided, however, that the power of the Governor and Senate relating to the suspension and removal of officers provided for in this Constitution shall not be impaired, but shall extend to all officers provided for in said home rule charter.

(2) Provision shall be made for the protection of the creditors of any governmental unit which is merged, consolidated, or abolished or whose boundaries are changed or functions or powers transferred.

(3) This home rule charter shall be prepared by a Metropolitan Charter Board created by the Legislature and shall be

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the powers conferred now or hereafter by general law upon municipalities.

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presented to the electors of Dade County for ratification or rejection in the manner provided by the Legislature. Until a home rule charter is adopted the Legislature may from time to time create additional Charter Boards to prepare charters to be presented to the electors of Dade County for ratification or rejection in the manner provided by the Legislature. Such Charter, once adopted by the electors, may be amended only by the electors of Dade County and this charter shall provide a method for submitting future charter revisions and amendments to the electors of Dade County.

(4) The County Commission shall continue to receive its pro rata share of all revenues payable by the state from whatever source to the several counties and the state of Florida shall pay to the Commission all revenues which would have been paid to any municipality in Dade County which may be abolished by or in the method provided by this home rule charter; provided, however, the Commission shall reimburse the comptroller of Florida for the expense incurred if any, in the keeping of separate records to determine the amounts of money which would have been payable to any such municipality.

(5) Nothing in this section shall limit or restrict the power of the Legislature to enact general laws which shall relate to Dade County and any other one or more counties in the state of Florida or to any municipality in Dade County and any other one or more municipalities of the State of Florida, and the home rule charter provided for herein shall not conflict with any provision of this Constitution nor of any applicable general laws now applying to Dade County and any other one or more counties of the State of Florida except as expressly authorized in this section nor shall any ordinance enacted in pursuance to said home rule charter conflict with this

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(g) DELETION OF OBSOLETE SCHEDULE ITEMS. The legislature shall have power, by joint resolution, to delete from this article any subsection of this Section 6,

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Constitution or any such applicable general law except as expressly authorized herein, nor shall the charter of any municipality in Dade County conflict with this Constitution or any such applicable general law except as expressly authorized herein, provided however that said charter and said ordinances enacted in pursuance thereof may conflict with, modify or nullify any existing local, special or general law applicable only to Dade County.

(6) Nothing in this section shall be construed to limit or restrict the power of the Legislature to enact general laws which shall relate to Dade County and any other one or more counties of the state of Florida or to any municipality in Dade County and any other one or more municipalities of the State of Florida relating to county or municipal affairs and all such general laws shall apply to Dade County and to all municipalities therein to the same extent as if this section had not been adopted and such general laws shall supersede any part or portion of the home rule charter provided for herein in conflict therewith and shall supersede any provision of any ordinance enacted pursuant to said charter and in conflict therewith, and shall supersede any provision of any charter of any municipality in Dade County in conflict therewith.

(7) Nothing in this section shall be construed to limit or restrict the power and jurisdiction of the Railroad and Public Utilities Commission or of any other state agency, bureau or commission now or hereafter provided for in this Constitution or by general law and said state agencies, bureaus and commissions shall have the same powers in Dade County as shall be conferred upon them in regard to other counties.

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including this subsection, when all events to which the subsection to be deleted is or could become applicable have occurred. A legislative determination of fact made as a basis for application of this subsection shall be subject to judicial review.

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(8) If any section, subsection, sentence, clause or provisions of this section is held invalid as violative of the provisions of Section 1 Article XVII of this Constitution the remainder of this section shall not be affected by such invalidity.

(9) It is declared to be the intent of the Legislature and of the electors of the State of Florida to provide by this section home rule for the people of Dade County in local affairs and this section shall be liberally construed to carry out such purpose, and it is further declared to be the intent of the Legislature and of the electors of the State of Florida that the provisions of this Constitution and general laws which shall relate to Dade County and any other one or more counties of the State of Florida or to any municipality in Dade County and any other one or more municipalities of the State of Florida enacted pursuant thereto by the Legislature shall be the supreme law in Dade County, Florida, except as expressly provided herein and this section shall be strictly construed to maintain such supremacy of this Constitution and of the Legislature in the enactment of general laws pursuant to this Constitution.

History. – Added. H.J.R. 858, 1941; adopted 1942; Am. S.J.R. 1046, 1955; adopted 1956.

163.3194 Legal status of comprehensive plan. –

(4)(a) A court, in reviewing local governmental action or development regulations under this act, may consider, among other things, the reasonableness of the comprehensive plan, or element or elements thereof, relating to the issue justiciably raised or the appropriateness and completeness of the comprehensive plan, or element or elements thereof, in relation to the governmental action or development regulation under consideration. The court may consider the relationship of the comprehensive plan, or element or elements thereof, to the governmental action taken or the development regulation involved in litigation, but private property shall not be taken without due process of law and the payment of just compensation.

DADE COUNTY CODE
ARTICLE XXXVI. ZONING PROCEDURE

Sec. 33-302. Definitions.

In construing the provisions hereof and each and every word, term, phrase or part thereof where the context will permit the definitions provided in Section 1.01, Florida Statutes, and Chapter 33 of the Code of Metropolitan Dade County, Florida, and the following additional definitions, shall apply:

(k) *Record.* The word "record" when pertaining to the record of any board shall mean and include any application, exhibits, appeal papers, written objections, waivers or consents, considered by such board, transcript or stenographic notes taken for the department at a hearing held before such board, if any, the board's minutes and resolution showing its decision or action, and if the record of a lower board is transmitted to a higher board, the record of the higher board shall include that of the lower board. The word "record" shall also include any and all applicable portions of Chapter 33 of the Code of Metropolitan Dade County, Florida, the report and recommendations of the planning director, building and zoning director and the developmental impact committee; the comprehensive development master plan for Metropolitan Dade County, Florida; and Ordinance No. 75-22, or as amended, or applicable neighborhood or area studies or plans approved by action of the board of county commissioners, as well as applicable district boundary maps, aerial photographs and final zoning resolutions. It shall also include the record made

as a result of any previous zoning application on the same property. The clerk of the county commission shall identify all exhibits used or referred to at the zoning hearing. All exhibits so identified or introduced shall be a part of the record. The record shall not include economic reports or studies, real estate appraisals or reports, and/or written reports of zoning consultants not filed in accordance with the provisions of section 33-315 of the Code, or any oral testimony or written reports or documents which were not filed in accordance with the provisions of section 2-114.1 of the Code.

Sec. 33-316. Exhaustion of remedies; court review.

No person aggrieved by any zoning resolution order, requirement, decision or determination of an administrative official or by any decision of the zoning appeals board may apply to the court for relief unless he has first exhausted the remedies provided for herein and taken all available steps provided in this article. It is the intention of the board of county commissioners that all steps as provided by this article shall be taken before any application is made to the court for relief; and no application shall be made to the court for relief except from resolution adopted by the board of county commissioners, pursuant to this article. Zoning resolutions of the board of county commissioners shall be reviewed by the filing of a notice of appeal in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in accordance with the procedure and within the time provided by the Florida Rules of Appellate Procedure for the review of the rulings of any commission or board; and such time shall commence to run from the date the zoning resolution sought to be reviewed is transmitted to the clerk of the commission. The director, or his duly authorized representative, shall affix to each zoning resolution the date said zoning resolution is transmitted to the clerk of the commission. The clerk of the board shall comply with all requirements of the Florida Rules of Appellate Procedure. For the purposes of appeal the director shall make available, for public inspection and copying, the record upon which each final decision of the board of county commissioners is based; provided, the director may make a reasonable charge commensurate with the

cost in the event the department is able to and does furnish copies of all or any portion of the record. Prior to certifying a copy of any record or portion thereof, the director or his designee shall make all necessary corrections in order that the copy is a true and correct copy of the record, or those portions requested, and shall make a charge of not more than ten cents ($0.10) per page, instrument maps, picture or other exhibit; provided, the charges here authorized are not intended to repeal or amend any fee or schedule of fees otherwise established. The chairman, vice-chairman or acting chairman of the board of county commissioners at any zoning hearing before the commission may swear witnesses and, upon timely request in writing, compel the attendance of witnesses in the same manner prescribed in the county court. The director of the building and zoning department shall employ a qualified court reporter to report the proceedings before the board of county commissioners, who shall transcribe his notes only at the request of the county or other interested party, at the expense of the one making the request. Such transcript, as well as the transcript of the proceedings before the zoning appeals board, when certified by the reporter, may be used in a court review of a matter in issue.